Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 79

2,872.88 ACRES OF LAND, ETC., ET AL.,
Petitioners,

versus

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONERS.

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The District Court rendered no opinion in the cases. It adopted the Commission's reports in the three cases. The opinion of the Court of Appeals for the Fifth Circuit (R. 112-119) is reported at 310 F. 2d 775.

JURISDICTION.

The judgment of the Court of Appeals was entered December 5, 1962 (R. 119-120). The order of the Court

of Appeals denying the Petition for Rehearing was entered on January 3, 1963 (R. 121). The Petition was filed on February 21, 1963 and was granted April 22, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Succinctly stated, whether a Master must expressly find what evidence he credited and what evidence he discredited.

Stated in the terms and circumstances of the case, however, it is whether a Master must affirmatively find, to permit intelligent review by an appellate court,

> (a) qualifications of witnesses, (b) which evidence it credited and which it discredited, (c) whether it gave credence to opinions based on knowledge of comparable sales or to opinions of value of witnesses who allegedly had little or no familiarity with the concept of market value, (d) whether in rendering its award it gave credence to an opinion allegedly without probative value or whether it arbitrarily scaled down such an opinion, and (e) whether particular evidentiary sales were truly comparable to the lands taken,

when the Master was given express instructions by the Trial Court as to the applicable rules of law (R. 21-26) and the Master made a personal inspection and view of the lands and made a report summarizing the evidence and containing express findings "from the evidence as a whole" (R. 33, 42, 91) as to:

(1) the highest and best use of the lands before and after the taking

(2) the value of the land taken in fee

(3) the severance damage to the remainder

(4) the value of flowage and other easements

(5) "fair market value" being the governing standard of its determination of value, and

(6) total just compensation,

and the end result showed that the Master rejected the opinion evidence of witnesses for Respondent and arrived at its own independent determination of value from weighing all the evidence in the light of their visits to the land taken and the case was the simplest of condemnation cases involving ordinary farm land (R. 113) and no underlying factor materially affecting the ultimate issue of just compensation was presented?

2. (a) Whether particular inadequacies in such a commission's report must be specified by specific objections to the report under Rule 53 (e) (2) in order to present a question for review by a Court of Appeals? and, (b) where no claim of excessiveness is made, is the failure to make evidentiary findings, if normally required, harmless error? and,

3. Whether a Court of Appeals in remanding a case for additional findings should specify the particular inadequacies on which findings must be made.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

The Federal Rules of Civil Procedure involved are Rules 52 (a), 53 (e) (1) (2), 71A (h), 46 and 61, and 63 Stat. 105, 28 U.S.C.A., § 2111.

STATEMENT.

Respondent filed actions to condemn the lands of Petitioners along with others. The District Court referred all of the cases to a Commission. (R. 18) under specific instructions. (R. 21.) No objections or exceptions were taken to this order by any party. The Chairman of the Commission was an experienced attorney. (R. 25.) The Commission visited each tract to view the lands condemned. The Commission entered their reports after conducting full-scale court trials of the issue of just compensation. These three cases involved ordinary farm land. No other use was involved under the evidence. The only unusual features involved in the three cases which could have materially affected the ultimate finding of just compensation:

(1) In the *Lindsey* case where the landowner contended for severance damage to his homeplace located several miles from the tract taken as to which the Commission made an express finding rejecting this contention. (R. 38, Finding of Fact No. 3), and

(2) The contention of the landowner in the *Watson* case that the land was valuable for subdivision pur-

poses which also was expressly rejected by the Commission. (R. 43.)

The reports of the Commission (R. 32-40, *Lindsey* case; 41-49, *Watson* case; and 89-99, *Gibson* case) contain a summary of the evidence for both parties, Findings of Fact including highest and best use, severance damage, fair market value of land taken and flowage and other easements and sum total of just compensation, and concluded that the fair market value of land taken at time of taking was the standard for determining just compensation. Pursuant to Rule 53 (e) (2), Respondent filed objections to the reports (R. 50, 52, 100) complaining that the reports did not "contain sufficient findings as to the matters on which the Commissioners based their valuation", and that the awards were "excessive, outside the range of proper testimony", and "outside the range of market value and therefore clearly erroneous". The District Court adopted and approved the reports. (R. 55, 56, 102.) Respondent subsequently on appeal specified as error the District Court's "approving . . . the reports of the Commissioners when the findings were inadequate to determine the basis on which the awards were made", and "when the reports themselves show that there were conflicts in the evidence but do not show how the Commissioners resolved them in making the awards". (R. 108), thereby abandoning the claim of excessiveness. The Court of Appeals reversed the judgments and remanded the cases for resubmission in order that the reports might meet the standards prescribed in its opinion, namely, that the Commission

find which evidence it credited and which evidence it discredited. There were conflicts in the evidence in each case as would be expected in any trial, but only in the witnesses' opinions of fair market value. Each of the Petitioners except Watson introduced sales which they contended to be comparable as independent evidence; Respondent introduced evidence of sales which it contended to be comparable only as a supporting basis for its expert's opinion of fair market value. The only conflicts in position between Petitioners and Respondent during the trials were (1) conflicts in opinion of market value, and (2) conflicts as to whether sales introduced in evidence by Petitioners were comparable.

The only questions before the Court of Appeals for the Fifth Circuit were:

(1) Whether the general objection to the Commissioner's awards, namely, that the reports did not contain sufficient findings as to the matters on which the Commissioners based their valuation was sufficiently specific to raise any question for review, particularly where no complaint was made as to the excessiveness of the awards. The opinion of the Court of Appeals did not decide this question but assumed that this general objection was sufficient.

(2) Whether the findings of fact were sufficient to sustain the judgments or whether the judgments should be vacated and the cases remanded for more specific findings.

The Court of Appeals, while noting no specific inadequacy of the findings of fact, made general observations which it concluded rendered the findings inadequate to permit an intelligent review, (R. 114, 117) and reversed the Trial Court's judgments and remanded the cases to the District Court for resubmission to the Commission in order that the reports might meet the standards prescribed in the opinion of the Court (R. 119-120).

SUMMARY OF ARGUMENT.

1. Rule 52 (a) contemplates the Court finding the ultimate underlying facts which led immediately to, and were, the determinative or component elements of, the judgment rendered. The Rule does not require findings to state (a) what evidence was credited and what evidence was discredited, nor (b) the reasoning on the evidence or actual process of decision, nor (c) the qualifications of the witnesses.

2. The purpose of findings is to sift from the evidence the pertinent ultimate facts so that relevant rules of law may be properly applied, and to enable an appellate court to determine if this has been done, and if the findings of fact are clearly erroneous under Rule 52 (a).

3. The nature of the findings of fact required by Rule 52 (a) depends upon the complexity of the issues involved, and where the issues of facts are simple and the principle of law governing the case is likewise a

simple guide, detailed evidentiary findings of what evidence was credited and discredited are neither required nor necessary for intelligent appellate review of the general processes of the trial below.

4. The findings of the highest and best use of the land before and after the taking, the value of the land taken, the severance damage to the remainder, the value of the flowage easements, and that the fair market value of the property taken is the rule of law applicable to determining the findings of fact is a sufficient compliance with Rule 52 (a) in the instant simplest of condemnation cases.

5. (a) Rule 53 (e) (2) and Rules 46 and 61 require specific objections to findings of fact by a Master so that the Trial Court might correct any inadequacy in the first instance and thereby avoid the long delay of continued litigation.

(b) The objections in the instant cases that merely state that the findings are inadequate because they do not show the basis of the awards nor how the Master resolved conflicts in the evidence fail to comply with the required specificity to present any question for review.

(c) Had the objections been sufficiently specific, they would have presented only academic questions when no complaint of insufficiency of the evidence was made by U. S. in instant cases.

6. The decision of Fifth Circuit Court of Appeals is erroneous, should be reversed and Trial Court's judgments reinstated because:

(a) It assumed that the objections were sufficiently specific to present the question for review, or that specific objections are not required under Rule 53 (e) (2) without mentioning the subject.

(b) It erroneously decided that a general complaint of inadequacy of findings, without an attending complaint of insufficiency of evidence or other specific error of law, constituted reversible error.

(c) It erroneously interpreted Rule 52 (a) as requiring findings of fact to state what evidence was credited and discredited by the Master, that is, the very process of decision, rather than the ultimate underlying facts which are the immediately determinative component elements of the judgment.

(d) It erroneously overlooked the principles that:

(1) whether a witness was qualified to express an opinion of values, and

(2) whether evidentiary sales were truly comparable are not underlying ultimate facts, but are preliminary evidentiary questions solely for the Master to determine, absent a claim of abuse of discretion in these respects as in the instant cases, as to which express findings are not required under Rules 52 (a) and 53 (e) (2).

ARGUMENT.

Preface.

For sake of brevity, Petitioners are hereafter called "Landowners"; Respondent is hereafter called "U. S."; The Court of Appeals for the Fifth Circuit is hereafter called "Fifth Circuit"; and the Commission is hereafter sometimes called "Master".

That this Court is more concerned in "why" the questions presented should be decided in a particular manner rather than "how" related questions have been decided in prior judicial pronouncements is indicated by the grant of certiorari in this case. The conflict in the decision sought to be reversed with the great weight of precedent in every judicial circuit of this country was demonstrated in Landowners' Petition for Certiorari (pp. 5-21). This case turns on the proper interpretation of Rules 52, 53, 71A (h), 46 and 61 of the Federal Rules of Civil Procedure. If our argument appears to be somewhat elementary, it is because the decision sought to be reversed is basically contrary to a proper interpretation and application of these rules.

I. Requirements Of Rule 52 (a) As To Findings Of Fact.

A. Ultimate Facts, Not Evidence Nor The Process Of Decision Nor Reasoning On The Evidence, Are Required To Be Found Under Rules 52 (a) And 53 (e) (2) Of The Federal Rules Of Civil Procedure.

Rule 52 (a) requires that in non-jury cases the "Court shall find the facts specially". As to interlocutory injunctions it requires that the Court shall "similarly set forth the findings which constitute the grounds of its action".

What are "facts" and what does the phrase "find the facts specially" truly mean? This is a key question in this case. There are other controlling questions and arguments that Landowners advance in this brief. However, this case first turns on the meaning of the one word "facts" as used in Rule 52.

It has been said that all generalizations including this one is false. This Court recognized this basic rule when it held in the case of *Kelley v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, (1) that the nature of findings of fact required under Rule 52 depends upon the particular case, (2) that delusive exactness is not required (3) that the "underlying factual basis" for the decision must be stated, and (4) that the nature of the findings required are for the Trial Court to determine in the first instance. It follows that the word "specially" as used within the rule is a relative term, depending upon the nature of the case.

At the outset, it should be remembered that the instant cases were the *simplest* of condemnation cases involving the valuation of farm land. "The issue was a simple one of valuation." *U.S. v. Twin City Power Company of Georgia,* (5th Cir., 1958), 253 F. 2d 195, 204. As this Court has stated:

"In an eminent domain proceeding, *the vital issue—and generally the only issue*—is that of just compensation." (Emphasis ours.)

McCandless v. U. S., (1936) 298 U.S. 342, 347-348, 56 S. Ct. 764, 766, 80 L.Ed. 1205, 1209.

The word "fact" has many connotations. In its broadest sense, it can refer to anything for "everything in the cosmos is a fact or phenomenon". 1 Wigmore on Evidence (2nd Ed.) p. 2, §1. It is plain that this was not the meaning intended by Rule 52. Neither was it intended to refer to evidence, evidentiary facts, statements of testimony, or comments on the evidence or its effect. Evidence is the means by which a fact is proved or disproved. Wigmore, in distinguishing between evidence and fact, defines evidence as "any knowable fact or group of facts, not a legal principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, on the part of a tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked. Id. p. 3. He continues: "Each evidentiary fact may in turn become a proposition to be proved, until finally some *ultimate* evidentiary fact is reached." Id. § 2, p. 6.

If finding "the facts specially" were construed to mean that the judge must find and state the evidence or evidentiary facts with particularity, there would be no end to a trial court's duty. He would be required, in the simplest of cases, to take each witness, and each evidentiary fact to which he testified, and state whether

he believed the testimony of each witness with respect to each such evidentiary fact. Under such an interpretation of Rule 52, there would be no limit to what must be included in findings. Judge Hall in *U. S. v. Gill*, 187 F. Supp. 728 stated:

> "In substance, the Government contends by Exception Number One that the commission should set forth what use it made of the testimony in arriving at its valuation, and asserts, among other things, that the commission failed to recite to what extent, if any, the commission considered the testimony of experts in assigning different values to different plots of the property and the severance damage.
>
> "If the Government, without requesting special findings, is correct in this contention, there would be no limit to what should be included in the commissioner's report. The report would have to indicate, for instance, what weight was given to each of the many so-called comparable sales used by an expert; what the value of each fence, gate and well was; the replacement cost of a well or other water supply; the amount of water consumed by grazing adult animals, or cow and calf operation, when there is no shade and the value assigned to shade trees for grazing cattle and the amount, if any, used as replacement cost of artificial shade; the value assigned to different grasses (six of them) which naturally grow on the property; and their relative quality as feed for grazing cattle; and many other things, all of which, as well as severance damage, are purely evidentiary and collateral to the issue of just compensation and are but some of the numerous things which go into the

final expression of opinion by each expert on the total sum necessary to make just compensation."

U. S. v. Gill, 187 Fed. Supp. 728 at pages 732 and 733.

This case was reversed on appeal by the Ninth Circuit, but only because there was no finding as to the highest and best use of the land. See 308 F. 2d 453 at 459.

The decision of the Fifth Circuit has gone even further. It requires in addition that findings include the qualifications of each witness and to state the reasoning on the evidence, the crediting or discrediting of the evidence, and the actual process of decision. That the Fifth Circuit had previously held to the contrary was disregarded.

"We do not think it is necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record. Cf. Seale v. United States, 5 Cir., 1957, 243 F. 2d 145." (Emphasis ours.)

U. S. v. Tampa Bay Garden Apartments, Inc., 294 F. 2d 598, 606 (5th Cir., 1961).

"A trial court may not be put in error for *failure to reveal the method employed* in calculating the amount of damages awarded since the *method* of assessing unliquidated damages in any case is not

required to be revealed by a trier of facts, either court or jury." (Emphasis ours.)

Ginsberg v. Royal Ins. Co., 179 F. 2d 152 (3); 5th Cir., 1950.

"Findings of the trial court are to be construed liberally in support of the judgment, even though they are not as explicit or detailed as might be desired."

The Travelers Insurance Company v. Dunn, 228 F. 2d 629, 630 (1), 5th Cir., 1956.

"Federal district court need *not* make findings on all facts presented nor make *detailed evidentiary findings*, nor make findings asserting *negative* of each issue of fact raised, and ultimate test as to adequacy of findings is whether they are sufficiently comprehensive and pertinent to issues to provide a basis for decision and are supported by evidence. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A." (Emphasis ours.)

Weber v. McKee, 215 F. 2d 447, 448 (4) (5) (6), 5th Cir., 1954.

"Oral findings that plaintiff, who brought suit against the government under the Federal Tort Claims Act, had a pre-existing defect in the formation of his lower back, and that such condition was aggravated at time of collision, and that he was permanently partially disabled, *were sufficient* to provide a basis for award of damages, and did not violate rule requiring special findings, even

though no special findings were made with regard to plaintiff's other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. Fed. Rules Civ. Proc. rule 52 (a), 28 U.S.C.A."

"The findings of fact were stated orally at the trial. *No exception has been taken to the form in which the findings were made.* These findings, the Government contends, violate Rule 52 (a) Fed. Rules Civ. Proc. 28 U.S.C.A. in that no special findings were made with regard to Jacobs' other physical conditions and their effect on his pain, suffering, impairment of earning capacity and need for future medical care. We think the findings are ample to provide a basis for the decision. Kelley v. Everglades Drainage District, 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485, 1486; Weber v. McKee, 5th Cir., 1954, 215 F. 2d 447. This being so, we see no error." (Emphasis ours.)

United States v. Jacobs, (5th Cir., 1962) 308 F. 2d 906, 907 (2).

B. Word "Facts" In Rule 52 (a) Is Used In Legal Sense To Denote The Ultimate Factual Conclusions Derived From Weighing The Evidence Which Are The Immediately Determinative Elements Of The Judgment.

The decisions referred to in the notes of Advisory Committee of 1946 to Subdivision (a) of Rule 52 contemplate ultimate facts, not the evidence or the reasoning thereon. See 5 Moore's Federal Practice, 2606, § 52.01.

Pertinent quotation from many of the authorities cited in this note and the distinctions in the cases support the conclusion that Rule 52 (a) requires only the finding of ultimate facts.

In *Hurwitz v. Hurwitz*, (D. C., 1943) 136 F.2 796 no findings of fact whatever were made, but the failure to make findings was held not to be prejudicial error.

> "Now, it is elementary that findings of fact should not contain a mere recital of the evidence, nor should they contain arguments or matters of explanation. The facts which the Court must find and state separately are the *ultimate issuable* facts—the facts which are put in issue by the pleadings or actually litigated as issuable facts by consent or without objection . . . .
>
> "It is the relief granted or rights adjudicated by the conclusions of law that go in the judgment.
>
> "We should not *forget* that it is unnecessary to make findings as to immaterial issues; that they should *not* contain *evidentiary facts* or comments of any kind. *The test is: Would the findings be sufficient to authorize a judgment if presented in the form of a special verdict.*". (Emphasis ours.)
>
> *Nordbye, Improvements in Statements of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 28, 32, 33.*

Landowners respectfully suggest that the decision of the Fifth Circuit did "forget" these basic fundamentals.

In *U. S. v. Forness,* (2nd, 1942) 125 F.2 928 the 2nd Circuit condemned as bad practice the inclusion of proposed findings and objections in the record without the independent determination of the ultimate facts by the Trial Court.

In *Matton Oil Transfer Corp. v. The Dynamic,* the Second Circuit remanded the case for findings of fact where *none* were made, and only a judgment exonerating one vessel and adjudging another solely responsible was entered without any factual basis therefor, the Court saying:

> "We realize that to enforce the rule in an *overscrupulous* way may impose onerous labors on a district judge, beyond those actually needed for a fair presentation of an appeal. We think it appropriate to say that we are not disposed towards such an enforcement, nor have we at any time required any *overelaboration of detail or particularization of facts.* We agree fully with the spirit and the terms of the resolution passed by majority vote of the judges at our Judicial Conference of last June recommending 'that the trial judge make *brief, pertinent findings* in respect to *contested matters* and file the same in connection with his opinion.' This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, overdetailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication.

See Gibbs v. Buck, 370 U.S. 66, 78, 59 S. Ct. 725, 732, 83 L.Ed. 1111; Epstein v. Goldstein, 2 Cir., 107 F. 2d 755, 758. The findings and conclusions of the court, however, which actually led it to the decision are helpful; and we do not think trial courts will find it unduly burdensome to state those briefly and concisely at the time decision is made. Compare Otis, J., Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 83, 85; Nordbye, J., Id., 1 F.R.D. 25, 31." (Emphasis ours.)

Matton Oil Transfer Corp. v. The Dynamic et al.; 123 F. 2d 999, 1001.

The note relies heavily upon the case of *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, (2nd, 1942) 126 F. 2d 992 which contains the following incisive language:

"Findings should not be discursive; they should not state the evidence or any of the *reasoning* upon the evidence; they should be categorical and confined to those *propositions of fact which fit upon the relevant propositions of law.* It is apparently impossible to expect this from counsel; and we are indeed aware that the requirement adds perceptibly to the judge's labors. Nevertheless, we are not convinced that if prepared along with the opinion, if *limited* in number to *disputed issues*, and if *confined* to the *ultimate* facts, their preparation will prove as serious a burden as is sometimes supposed; and certainly, if so prepared, they will prove of much value in the administration of justice, and will incidently greatly increase the fi-

nality of the decisions of the district court." (Emphasis ours.)

Petterson Ligtherage & Towing Corp. v. New York Central R. Co. (2nd Cir.; 1942) 126 F. 2d 992, 996.

In *Brown Paper Mill Co., Inc. v. Irvin*, the 8th Circuit stated:

"(1) Findings of fact should be a 'clear and concise statement of the ultimate facts, and not a statement, report or recapitulation of evidence from which such facts may be found or inferred.' (Citing authorities.)

Id. d943, 134 F. 2d 337 at 338.

In *Allen Bradley Co. v. Local Union No. 3*, the Second Circuit again reiterated the necessity for findings on the factual crux of the case in the following words:

"Doubtless this was done to satisfy requirements that an injunctive order must set forth the reasons for its issuance and describe in reasonable detail the acts to be restrained, Federal Rule 65 (d), 28 U.S.C.A. following section 723c, continuing 28 U.S.C.A. § 383, cf. 29 U.S.C.A § 109; but a multiplicity of words is as little revealing as a dearth of words. Labor union officers and members are entitled to a more direct and succinct statement of the illegalities of which they are held guilty and which they must cease under penalties of fine and imprisonment. This basic requirement assumes the greater importance here because the course of decision below has left the case not free of ambigu-

ity on a crucial feature. For, as we shall point out, recent decisions have conceded labor unions quite broad powers to refuse to work and to employ peaceful persuasion, but have left open the effect of combinations or conspiracies of unions with non-union elements, particularly for non-union objectives. Thus the nature and purpose of the conspiracies here may quite possibly be the crux of the case."

Id. 1944, 145 F. 2d 215 at 219.

In *Young v. Murphy,* (Ohio, 1946) 9 Fed. Rules Service, 52a 11, case 2, 7 F.R.D. 72, it was stated:

"Findings and conclusions should include only the ultimate facts found together with sufficient findings to support Court's opinion and judgment and not a narrative of the evidence or of the evidence and conduct of the parties in earlier proceedings or the argument or conclusions of the draftsman."

Judge Merrill E. Otis, in his able article on Improvements in Statement of Findings of Fact and Conclusions of Law concludes that each trial judge as he makes findings of fact and conclusions of law, should ask himself these questions:

"No. 3: Is each of your findings a statement of an ultimate fact?

"No. 4: Are all of the ultimate facts necessary to support the judgment or decree stated in the findings?"

Id. 1 F.R.D. 83 at 85.

and then comments:

"Comment: Requirements 3 and 4 have been stated hundreds of times by Appellate Courts, scores of times by the Supreme Court of the United States. In its wording the principle is simple. The difficulty in its application is in determining what are the ultimate facts in a given case. It seems to be conceded by all who have given serious thought to the matter that it is not possible to form a definition which will be a sure guide at all times. We know that an ultimate fact is to be distinguished from mere evidence. The Supreme Court has said that. Old Eq. Rule 25, 28 U.S.C.A. following § 723, which concerns the framing of a complaint in equity, makes that distinction. The distinction is presented in the very word 'ultimate' in the phrase 'ultimate fact'. Perhaps we may say as to any fact, whether it has been directly proved in evidence or is an inference from facts proved, if it serves the sole function of supporting (not some other inference of fact) but the final legal conclusion that either Plaintiff or Defendant shall prevail, perhaps we may say as to such a fact, it is an 'ultimate fact.' It occurs to me that there are two tests with which every federal judge is familiar which the judge may use to determine whether facts he is considering for his findings are ultimate facts. The tests are these—1. If he were drawing a complaint for the Plaintiff in the case before him, what allegations of fact would he want to support the prayer of his complaint? 2. If the case were a jury case, what facts would he in his charge require the jury to find as a basis for a verdict for the Plaintiff? These are

the 'ultimate facts' required to support a judgment for the Plaintiff. I consider that often a finding of one ultimate fact (or two or three ultimate facts at the most) may be sufficient to support a judgment for the Defendant."

Id. pp. 85-86.

"Is there not an analogy here between findings of fact and conclusion of law. Only ultimate facts are to be stated not every evidential fact that merely leads to some ultimate fact. Why should there be stated in the formal conclusions every intermediate conclusion of law, which serves no other purpose than to lead to the final conclusion. Every case is filled with the judge's statements of conclusions of law on preliminary motions, or points of evidence on all kinds of questions presented in the trial at one time or another. Every-one of these conclusions, in a sense is intermediate, not the final, the ultimate, the determining conclusion of law."

"No one indeed ever has had the thought that every conclusion of law reached in a case should be stated in the formal conclusions. It has, however, been my thought heretofore that the more important conclusions those nearest in logical order to the final conclusion should be stated."

Id. pp. 86-87.

An enlightening comment on the intent and application of Rule 52 (a) by George F. Longsdorf, Librarian for the Ninth Circuit Court of Appeals, is found in a footnote to the article by Judge Yankwich entitled, "Findings in the Light of Recent Amendments to the

Federal Rules of Civil Procedure", 8 F.R.D. 271, which quotation reads as follows:

> "Rule 52 (a) of the Federal Rules of Civil Procedure requires the judge (the Rules uses the word 'court') to 'find the facts specially'. Here, as elsewhere, 'specially' is a relative word, which, I take it, means that the judge shall make a finding *on each specific fact which is ultimate or essential to a conclusion* which supports his judgment. If I am right, then in one case a finding of a particular fact might be sufficiently specific, while in another case exactly the same language of finding might be too general.
>
> "I am inclined to reject the notion that the findings are to be a *history of what went on in the judge's mind*, taken in by his ears and eyes against his undescribable background knowledge; and to *believe* that the findings are to be only *those supportable deductions from evidence* in the transcript which will yield the conclusions reached and the judgment given. If we go into the *psychology* of it too far we shall have a result *too much like fertile eggs over treated with heat and stirring, to wit, scrambled eggs instead of chicks.*" (Emphasis ours.)
>
> *Id. 8 F.R.D. 271, 285-286.*

This statement is in accord with this Court's ruling in the *Kelley* case, 319 U.S. 415, to the effect that the nature of the findings required depend upon the subject matter of the case and the nature of the thing decided.

C. Prior Decisions Of This Court Relating To Findings By A Trial Judge In a Non-Jury Case Are In Accord With The "Ultimate Fact" View Of The Rule.

"The special finding is a statement of the ultimate facts on which the law of the case must determine the rights of the parties, and not the evidence on which these ultimate facts are supposed to rest."

Norris v. Jackson, 9 Wall 125, 19 L.Ed. 608 (1870).

"A special finding of facts by the Court need only find the ultimate facts, not the evidence."

Union Consolidated Silver Mining Co. v. Taylor, (3) (1879) 100 U.S. 37, 25 L.Ed. 541.

To same effect:

Merchants' Mut. Ins. Co. v. Allen, (1887) 121 U.S. 67 (4), 7 S. Ct. 821.

Merchant's Mut. Ins. Co. v. Allen, (1887) 121 U.S. 67, 7 S. Ct. 821 at 824.

Grayson v. Lynch, (1896) 162 U.S. 468, 16 S. Ct. 1066.

Wilson v. Merchants' Loan & Trust Co., (1901) 183 U.S. 121, 22 S. Ct. 55, at pp. 58, 59.

See also: 53 Am. Jur. 795, § 1142.

"A *discussion of portions of the evidence* and the District Court's *reasoning* in its opinion do *not* constitute the special and formal findings by which it is court's duty appropriately and specifically to determine all issues presented, and are *not* a compliance with equity rule requiring fact findings

and conclusions of law to be stated. Equity Rule 70-1/2, 28 U.S.C.A. following section 723." (Emphasis ours.)

Interstate Circuit Inc. v. United States, (1938) 304 U. S. 55, 58 S. Ct. 768 (3).

"And where, as here, different classes of creditors assert prior claims to different sources of revenue, there must be a determination of the extent to which each class is entitled to share in a particular source, and of the fairness of the allotment to each class in the light of the probable revenues to be anticipated from each source. To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Kelley v. Everglades Drainage Dist., (1943) 319 U.S. 415, 420, 63 S. Ct. 1141, 1144.

"We agree. Fed. Rules Civ. Proc., Rule 52 (a), 28 U.S.C.A., in terms, contemplates a system of findings which are 'of fact' and which are 'concise'. The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in *hard and complex* cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. Kelley v. Everglades Drainage District, 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485, and cases cited."

Dalehite v. United States, (1953) 346 U.S. 15, 24, 73 S. Ct. 956, 962, note 8.

The complexity of the issues in the *Kelley* and *Dalehite* cases are in contrast with the simplicity of the issue in the instant cases.

A comparatively recent pronouncement on the subject of findings under Rule 52 (a) is the opinion in the case of *Stanton v. United States*, (1960) 363 U.S. 278, 292, 80A S. Ct. 1190, 1200, where this Court stated:

> "To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a 'gift'. To be sure, conciseness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See Matton Oil Transfer Corp. v. The Dynamic, 2 Cir., 123 F. 2d 999, 1000-1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately * * * conclusions of law thereon.' While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive."
>
> *Stanton v. United States, (1960) 363 U.S. 278, 292, 80A S. Ct. 1190, 1200.*

The *Stanton* case is readily distinguishable. This Court in that case held that an unelaborated finding of a legal conclusion of a "gift" did not constitute an adequate finding of the element of "intent" as an underlying fact of the gift. Failure to find a fact as to the only contested element of the ultimate issue is inadequate; but this hardly means that a Court must state what evidence he believed or disbelieved.

D. Findings Of Fact And Conclusions Of Law Of Master's Reports Are Adequate For Purposes Of Proper Rveiew In Instant Cases.

The number and nature of findings required by Rules 52 and 53 depend upon:

(1) the nature of the contested issues involved in the case,

(2) the specific objections to the Master's findings, and

(3) the issues raised on appeal.

Before discussing these questions, the proper scope of appellate review by an intermediate Appellate Court as contemplated by the Rules should be kept in the forefront.

Findings are not jurisdictional nor are they the ultimate goal of the judicial process. Indeed, one of their prime purposes is to give the Appellate Court an understanding of the basis of the judgment so that it may determine if the judgment is clearly erroneous. In this connection, it is not the province of a Court of

Appeals to retry the case, even if it could. It is not generally concerned with the economic adequacy or inadequacy of the judgment. When the issues are properly presented on appeal, it will not generally reverse a judgment unless it is convinced (1) that a mistake has been made, or (2) that the Trial Court has labored under a clear misapprehension of the law which infected the judgment, or (3) that the judgment is without competent evidence to support it. The Appellate Court must give due regard for the pre-eminence of the factfinder to judge the credibility of the witnesses. This takes on added significance when the factfinder has viewed the land, and is in a position to weigh opinion testimony and judge the comparability of contended comparable sales as no one else is. Indeed, the burden of overthrowing an award of value becomes increasingly heavy since value, like intent, is peculiarly a fact question. The burden is all the more onerous when it is recognized that fair market value is little more than an informed guess and, further, there are no automatic or mathematical formulae for the determination of fair market value which an Appellate Court might apply to an award, even though it would have rendered a different decision had it been the factfinder. Only the factfinder has the inherent right to disregard the opinion testimony of any witness.

There is no contention by U. S. that any error of law infected the judgment, nor that the legal standard of fair market value was not understood and applied, nor that the awards are not within the range of competent

evidence to support them. The only contention raised was that the findings did not spell out how the Commissioners arrived at their award, nor expressly state how they resolved the conflicts in the evidence. While the U. S. could have raised the question of the sufficiency of the evidence, it did not do so.

No court decision of which we are aware had previously held that a Court must state the process by which it arrived at the amount of the damages assessed in the judgment. There are cases which hold to the contrary.

The U. S., in its Petition for Certiorari in Case No. 790, *U.S. v. Merz*, phrases the question presented as follows:

> "Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined."

The phrase "tried outside the presence of the Court" is not entirely accurate. A Master is an arm of the Court expressly provided for by Rule 53 and 71A (h). The clause "which does not show what facts were considered or what law was applied" is not applicable to instant case, and erroneously presumes that a report must state all purely evidentiary facts and evidence considered.

In the instant cases, the reports as well as the instructions to the Master show that the concept of fair market value governed the Master. The Master expressly so found. (R. 21, 40, 48, 98.) Insofar as "what facts were considered", the reports found "from the evidence as a whole" which was summarized all essential facts, namely: (1) highest and best use of the land before and after the taking (2) severance damages and the basis therefor, and (3) the value of the flowage easements. In the *Lindsey* case (R. 38) the report made an express finding as to no severance damage to his homeplace. In the *Watson* case (R. 43) the Commission expressly found that evidence of use of the property for residential or subdivision purposes was rejected.

Other than the facts found, there was nothing else for the Commission to consider save opinion evidence and the comparable sales introduced by Landowners, weighed in the light of their visit to the land. The word "facts" as used in the question as phrased necessarily presumes that evidentiary facts as distinguished from ultimate facts are required to be found as considered. Landowners respectfully submit this is not required.

Professor Wigmore again furnishes an analogous illustration. See 1 Wigmore on Evidence (2nd Ed.) p. 2, § 1. Assume a case where the ultimate *issue* is the question of ownership of a tract of land by John Doe. This breaks down into the underlying ultimate evidentiary facts that John Doe's father died without a will leaving John Doe as his sole heir. Merely finding

that John Doe was the owner of the tract of land might be deemed by some Courts an insufficient compliance with the rule. For example, this Court concluded in the *Stanton* case, 363 U.S. 278, 292, that the unelaborated finding of a "gift" was insufficient.

Applying this example to the instant cases, however, the ultimate issue was just compensation. On analysis, this issue resolved itself into three component elements, or ultimate underlying facts, namely: (1) the fair market value of the land taken (2) the severance damage to the land not taken, and (3) the value of the flowage easements. All of the evidence, whether opinion evidence or allegedly comparable sales were introduced to persuade the Commission as to these underlying ultimate facts of the ultimate issue of just compensation. The failure to grasp the distinction between purely "evidentiary facts or evidence" and the "ultimate underlying facts or the underlying factual basis" for the judgment lies at the root of the error of the Court of Appeals for the Fifth Circuit.

Next, "effective court review" does not contemplate retrial of the factual issues but only to determine if the facts found are clearly erroneous.

Next, effective court review must be for some specific purpose on questions properly raised in the appeal itself. The U. S. not only failed to file specific objections to the findings of the Commission, but likewise failed to raise any question on review by the Court of Appeals as to excessiveness or insufficiency

of the evidence. More specific findings for what? Findings are not the goal of the judicial process, as has been repeatedly recognized. The object of findings is to prevent star-chamber methods; not to overburden trial judges with an overscrupulous enforcement of Rule 52 (a).

Fairly construing the reports under the presumption of correctness, and drawing the only inference that can be drawn from the end result, it is obvious from the summary of the evidence considered and the end result that the Commission rejected the opinion evidence of the witnesses for the U. S. and did not as such accept the opinions of Landowners' witnesses nor find Landowners' comparable sales to be identical but arrived at their own independent findings, weighing the evidence in the light of their visits to the lands taken. That the ultimate awards exceeded the amounts initially deposited into Court by the U. S. as required by law is wholly unrelated to the trial of the case on appeal or otherwise. Due process required these deposits before the taking of the land. The deposits have no other relevancy. In fact, the amount deposited is not admissible in evidence, and the fact that the awards exceeded the amounts deposited does not make for, nor illustrate the Fifth Circuit's conclusion (R. 113) that the failure to contend excessiveness did not render the failure to make detailed findings harmless. This was wholly foreign to any issue on appeal, and the reference to it by the Court of Appeals points to the unsound basis of the decision sought to be reversed.

II. No Questions Were Properly Presented For Review By Court Of Appeals.

A. Specific Objections To Master's Report Are Necessary To Present Question For Review, Where No Claim Of Insufficiency Of Evidence Nor Excessiveness Is Made.

Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides:

> ". . . within 10 days after being served with notice of the filing of the report any party may serve *written objections* thereto upon the other parties. Application to the Court for action upon the report and upon *objections* thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or *may recommit it with instructions.*" (Emphasis ours.)

This Court held in *Kelley v. Everglades Drainage District*, 319 U. S. 415, at 422, 63 S. Ct. 1141, at 1145:

> "Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the naturc of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

Id. p. 422.

It further stated that "Delusive Exactness of findings is likewise not demanded". Id. p. 419.

Rule 53 (e) (2) clearly requires specific objections to the Master's report. 5 Moore's Federal Practice 2970-71, § 53.11, notes 20-23 inclusive, and cases cited.

> "There *was and still is* a proper use of exceptions or objections to make and save a question for review in the sense that upon the incoming of a master's report objection to it must have been taken, otherwise the report will be confirmed as made. Whatever it be called, this is not an exception to the court's ruling, but rather is but a mode of objecting below, in order to make an assignable ruling. The action of the court is subject to review on appeal from the decree, and is reviewed on the record thus made. Proper practice requires that objections to a master's report be taken in the trial court, so that any errors discovered therein may be rectified by the court itself, or by a reference to the master for correction." (Emphasis ours.)
>
> *Cyclopedia of Federal Procedure, (3rd Ed.) Vol. 13, §59.39, pp. 372, 373.*

No such specific objections to the Master's report were made by U. S. In substance, the only objections made by U. S. on appeal (R. 108) was (1) that the trial court erred in not ordering the Master to make complete findings of fact; (2) the findings of the Master's reports were inadequate to determine the basis on which the awards were made; and (3) that the reports

do not show how the Master resolved conflicts in the evidence.

These are no objections whatsoever. They point to nothing. They do not tell the Trial Court in what respects the reports are inadequate. Objections serve a useful and meritorious purpose, namely, (1) to relieve the Trial Court from having to retry the entire case, and (2) to give the Trial Court an opportunity to have specific inadequacies remedied, prior to appeals to appellate courts, and thereby avoid the interminable delay of continued litigation. Rule 52 (a) provides that "Requests for findings are not necessary for purposes of review" and 52 (b) provides that "When findings of fact are made in actions tried by the Court without a jury, the *question of the sufficiency of the evidence* to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings . . . ". *This rule applies to findings by the District Court, not to a Master's findings as to which Rule 53 is controlling.* Any authorities to the contrary (See *Henry Hanger & Display Fixture Corporation of America v. Sel-O-Rak Corporation*, (5th Cir., 1959) 270 F. 2d 635 (11), failure of decree to allow claimed credits as to which the evidence to support same was lacking) ignore the basic purpose of requiring objections to a Master's report. The following better reasoned authorities require specific objections to a Master's report so that the Trial Court may correct or have corrected the reports in the first instance.

"Exceptions to a Master's report should point out *specifically* the errors relied upon; and they need not be considered if they are so broad as to amount merely to a denial of the facts and conclusions of the master, so as to require the court to rehear the entire case." (Emphasis ours.)

Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon et al., 151 U.S. 285 (3), 14 S.Ct. 343.

To same effect:

(a) *U. S. v. Northern Pacific Railway Company,* (1940) 311 U.S. 317 at 371-372, 61 S. Ct. 264, 288-289.

(b) *Coghlan v. South Carolina Railroad Co.,* 142 U.S. 101, 12 S. Ct. 150 at 154.

(c) *Thomson Machine Co. v. Sternberg,* (District Court, Illinois, 1931) 55 F. 2d 715.

(d) *Virginia-Carolina Tie & Wood Co., Inc. v. Dunbar,* (4th, 1939) 106 F. 2d 383 (6), at 386 and cases cited.

(e) *Massachusetts Bonding and Insurance Co. v. Preferred Automobile Insurance Co.,* (6th, 1940) 110 F. 2d 764 (1) (2).

(f) *Bucy v. Nevada Construction Co.,* (9th, 1942) 125 F. 2d 213 (8).

(g) *Kimm v. Cox,* (8th, 1942) 130 F. 2d 721 (14) (16).

(h) *Socony-Vacuum Oil Co., Inc. v. Oil City Refiners, Inc.*, (6th, 1943) 136 F. 2d 470 (17), at 475.

(i) *U. S. v. Vater*, (2nd, 1958) 259 F. 2d 667, 668 (4) (8).

The most recent treatment of this subject as applied to the identical contentions made by United States in the instant cases which was adopted by the Fifth Circuit in the opinion to be reviewed, was expressly rejected by the Ninth Circuit Court of Appeals in the case of *United States v. Lewis et al.*, (9th, 1962) 308 F. 2d 453 wherein the Court stated:

"(2) The United States appears to urge upon us a sort of supervisory function in this respect and that we deal with the matter in the abstract. It invites us to look at the commission's reports in these cases; to observe that each upon its face fails to measure up to standard; to send the cases back with general instructions that adequate reports be made.

"This course we reject. *If there be inadequacies in a particular report, they must be specified by objection to the report.* If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations.

"We shall then in each case examine the record and briefs to ascertain what specific matters are asserted, by objections of the United States, not

to have been dealt with adequately."' (Emphasis ours.)

Id., p. 456.

While Rule 52 (a) provides that "the findings of a Master, to the extent that the Court adopts them, shall be considered as the findings of the Court", the appellant without filing specific objections to the Master's report as contemplated by Rule 53 (e) (2) is *restricted* on appeal to the question of the sufficiency of the evidence to support the findings as is provided in Rule 52 (b). Such is the plain intent of the Rules.

Landowners do not contend that it is necessary that specific objections be made to the Master's report in order to raise the question of the sufficiency of the evidence on appeal. Landowners do contend, however, that it is necessary in order to raise any *other* question on appeal to a Circuit Court of Appeals, to file specific objections to a Master's report so that the Trial Court may be given an opportunity to consider the question raised, and carry out its express duties under the last sentence of Rule 53 (e) (2). Rule 46, while it dispenses with formal exceptions, still must be construed with Rule 52 (e) (2) and the requirement of making known to the Trial Court the action which one desires it to take or his objection to the action of the Court and his grounds therefor still has substantive application.

The fact is that no contention is made by United States in the instant cases that the evidence is insuf-

ficient to support the awards, nor that the awards are excessive. (R. 108-109.) The points upon which U. S. relied on appeal do not mention this contention. U. S. did so contend in its original objections to the Master's Reports, (R. 50, 52, 100) but abandoned same when it limited its points on which it intended to rely on appeal. Having so limited its contentions by its designation of points, it is so bound, and no other questions were properly before the Fifth Circuit. See Rule 75 (d) of the Federal Rules of Civil Procedure. The Fifth Circuit (Rule 10) has adopted Rules 46 and 75 of the Federal Rules of Civil Procedure. There is no error in failing to consider a point not specified in the designation of points. *Jesionowski v. Boston & M. R. R.*, 329 U.S. 452 (5), 67 S. Ct. 401. If U. S. is so restricted, then why consider the abstract or moot question of whether the findings are adequate? The questions raised by the designation of points are indeed abstract or moot questions. It is not the function of Appellate Courts to render advisory opinions to the U. S. or anyone else.

In addition, the decision of the Court of Appeals runs counter to the harmless error rule embodied in the Act of May 24, 1949, C. 139, § 110, 63 Stat. 105, 28 U.S.C.A., § 2111, which provides:

> "On the hearing of any appeal of writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This is in substance the same rule as Rule 61 of the Federal Rules of Civil Procedure applied to Appellate Courts.

"Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."

Palmer v. Hoffman, 318 U.S. 109, 116, 63 S. Ct. 477, 482.

"Where master's findings and Court's judgment result in substantial justice as between parties, judgment should be affirmed under former section 391 of this title."

I.T.S. Rubber Co. v. Tee Pee Rubber Co., (C.C.A. Ohio, 1924) 295 F. 479.

"Error is not ground for reversal unless it is prejudicial to substantial rights of appellant."

Commercial Credit Corporation v. United States, (C.A. Minn., 1949) 175 F. 2d 905.

"Fact matters which have been determined by a master and approved by Trial Court should not be overturned except on clearest showing of mistake."

Seeley v. Hunt, (5th Cir., 1940) 109 F. 2d 595.

"Where any modification in subsidiary findings would not be basic or essential ones, no reversible error is shown."

U. S. v. Crescent Amusement Co., 323 U.S. 173, 65 S. Ct. 254, 89 L.Ed. 160.

III. Decision Of 5th Circuit Court Of Appeals Is Clearly Erroneous.

Landowners acknowledge the burden of demonstrating that the decision sought to be set aside is erroneous, see *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (3), 63 S. Ct. 337, 87 L. Ed. 468, and assert that it is clearly wrong and should be reversed; and the Trial Court's judgment reinstated, for the following reasons:

(1) It misconstrued and misapplied the requirement of the Court finding the ultimate facts specially under Rule 52 (a) to the simplest of condemnation cases.

(2) It relaxed the requirement of specific objections to a Master's Report as contemplated by Rules 53 (e) (2) and Rule 46, where no claim of excessiveness was made, and thereby erroneously considered a question not raised in the Trial Court.

(3) It required detailed evidentiary findings and the Master to state what evidence it credited and discredited, in fact, the process by which the ultimate awards were reached, contrary to prior holdings, so that it might determine if the awards were clearly erroneous, as though there existed an automatic formu-

la by which it could redetermine market value, when no claim of insufficiency of the evidence was made.

(4) It violated the essence of Rule 61 of the Federal Rules of Civil Procedure in assuming that a reviewable question was presented, and that detailed evidentiary findings were necessary although no claim of excessiveness was made. In other words, it holds that one can show reversible error without showing both error and injury, contrary to the requirement that no judgment be reversed for errors which do not affect the substantial rights of the parties.

(5) It relied upon decisions altogether not in point, and which, if reasonably construed, support Landowners' position.

(6) It ignored all presumptions in favor of the Trial Court's findings.

(7) The decision, if correct, utterly destroys the utility of a Master under Rule 53.

(8) The decision, if correct, throws an intolerable burden on the already heavily burdened trial judges of the Federal District Courts.

(9) It misconceives the scope of proper appellate review of findings of fact.

(10) Contrary to repeated authority, it seeks to retry the case on an appellate level.

(11) The error of the decision stems from an erroneous assumption that the propriety of reference to a commission instead of a jury trial was a question on appeal.

(12) It ignored the province of the Master to determine qualifications of witnesses, the weight of opinion evidence of value, and comparability of evidentiary sales, in absence of abuse of discretion as to which no contention was made by U. S.

A. Question Of Reference To Commission Not Involved.

The opinion of the Fifth Circuit commences by citing the following cases in support of its decision.

1. *U. S. v. Buhler*, 5 Cir., 254 F. 2d 876.

2. *U. S. v. Leavell & Ponder, Inc.*, 5th Cir., 286 F. 2d 398, 407, 408.

3. *U. S. v. Buhler*, 5th Cir., 305 F. 2d 319, 331.

These cases are cited in support of its position that the trial of condemnation cases is typically for the jury and the appointment of commissioners is proper only in the exception case. (R. 114.) This is basic since it is incorporated in Rule 71A (h) of the Federal Rules of Civil Procedure. In fact, the entire error of the Court's decision stems from the assumption that this was an issue in the instant cases, when it was not remotely involved. The facts are that *both*

Landowners and U. S. demanded a jury trial initially. The Trial Court referred the cases to a Commission, and neither of the parties excepted nor made this a basis of appeal, claiming an abuse of discretion in this respect.

Next, the opinion seeks to justify its requirement of the Commission "baring its soul" in its report by pointing out the claimed advantages of a jury trial over a Commission. (R. 114-115.) This utterly ignores the precautions taken by the Trial Court. He gave the Commission detailed instructions (R. 21). The Chairman of the Commission was an experienced attorney, skilled in all respects of the judicial process. (R. 23.) Presumably he knew the elementary law applicable to the simplest of condemnation cases, and that truly comparable sales, if found to be such, are the highest and best evidence of market value. The conclusions of law so acknowledge (R. 48). The decision in *Baetjer v. U. S.*, (1st Cir., 1944) 143 F. 2d 391, 397, states that truly comparable sales are the best evidence of market value. This is basic. It also holds that whether sales are truly comparable and entitled to weight is for the factfinder to determine. The decision in *International Paper Co. v. U. S.*, (5th Cir., 1955) 227 F. 2d 201, 208, merely follows this well-recognized law. A good statement of the rule is likewise found in *U. S. v. Burlington & Ocean Counties* which held:

> "In condemnation proceeding, recent sales of particular premises or of similar parcels are the

most desirable standard in determining value of property, but, in absence of such sales, valuation still can be arrived at by opinion evidence."

U. S. v. 13,255.53 Acres of Land in Burlington & Ocean Counties, N. J., 158 F. 2d 874 (4) (3rd Cir., 1946).

To same effect: *Baetjer v. U. S.*, (1st Cir., 1944) 143 F. 2d 391 (16).

See also: *Welch v. Tennessee Valley Authority*, (6th Cir., 1939) 108 F. 2d 95 (22).

B. Qualifications Of Landowners' Witnesses Not Involved.

The opinion makes an indirect reference to the "defects and weaknesses of the testimony of the interested parties to the proceeding, such as the owners of the land involved." (R. 114), and the qualifications of the Landowners' witnesses. (R. 114.) No reference was made to the lack of findings of the so-called experts for the U. S. This completely overlooks the generally accepted principles of law that the owner of a tract of land is presumably qualified to give an opinion as to its value, without first proving his qualifications.

The question of the Landowners' qualifications was not remotely involved in the instant cases. No objection to the witnesses' testimony for lack of qualifications to testify was made by U. S. Had objection been made,

they would not have been meritorious under well established principles.

See 1 Wigmore on Evidence, (2nd Ed.), § 711-714, pp. 1129-1131 where it is stated that the matter of a witness's qualifications to testify as to value involves three distinct questions, namely:

"(1) the experiential capacity of witness.

"(2) his knowledge of the standard of value.

"(3) his knowledge of object to be valued."

Id. § 711, *p. 1129.*

This author then states:

"The general tendency of the Courts, however, is towards a broad principle that no special training or occupation is necessary to enable one to estimate values. . . . The practical effect may be said that Courts will prefer to require no special training except where it seems to be clearly essential."

Id. § 712, *p. 1130.*

"Land Value—

"(1) Must the witness be by occupation a dealer in land? The Courts unanimously answer this in the negative.

"(2) Must the witness himself have made a purchase or a sale of land or a number of them? This is generally answered in the negative. Yet certainly such a personal participation in sales would be a sufficient qualification.

"(3) Must the witness at least have had knowledge, not merely of general value—rumor or the like but of specific sales made? This too is generally regarded as not essential. But certainly such knowledge of specific sales in the neighborhood is a sufficient qualification.

"(4) Occasionally all specific limitations or tests are abandoned and the broad test adopted that 'any person having knowledge of' or 'acquainted with' the values may testify. The determination of the qualification thus being left open for each case. This is perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge . . .

"(5) A sufficient qualification is usually declared to exist where the witness is a resident, landowner or farmer, in the neighborhood."

Id. § 714, *pp. 1130, 1131.*

To same effect: Orgel on Valuation Under Law of Eminent Domain, Vol. 1, § 132, pp. 567-568.

Whether a particular witness is qualified to render an opinion as to value is a preliminary question of fact for the Chairman of the Commission to deter-

mine, (R. 25), as to which he is allowed a wide discretion. Orgel on Valuation under the Law of Eminent Domain, Vol. 1, § 132, pp. 564 et seq. and cases cited. The decision erroneously infers (R. 114) that the witnesses were not qualified, although no point was raised by the U. S. in this regard.

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This Court and numerous other Courts have affirmed the generally accepted rule that an owner is presumed to have sufficient knowledge to testify as to the value of his land. Lack of experience goes not to competency of the witness but to credibility.

> "3. In an action for compensation for the right of way of a railroad, taken through a mining claim, or 'prospect', witnesses resident in the neighborhood, and familiar with the property, are competent to testify as to its value, though their opinions may not be based on sales of the same or similar property."
>
> *Montana Ry. Co. v. Warren et al., (1890) 11 S. Ct. 96 (3), 137 U.S. 348.*

> "After a witness has testfied that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination."
>
> *Id. 11 S. Ct. 98.*

To same effect:

Nicholson v. U. S., (8th Cir., 1944) 141 F. 2d 981 (10);
Ruud v. U. S., (9th Cir., 1958) 256 F. 2d 460 (1). (2) (3);
U. S. v. Alker, (3rd Cir., 1958) 260 F. 2d 135, 156.

At any rate, this question was not before the Fifth Circuit, and it properly had no place in a decision of the case. Had it been involved it would have been without merit because adequate qualifications were proved as to each witness, as an examination of the transcript would disclose.

Finally, Rule 52 (a) had not been construed heretofore to require findings to state the qualifications of each witness.

C. Decision Relies Upon Decisions Not In Point, And Overlooks Clear Thread Of Distinction In the Cases.

The opinion of the Fifth Circuit states that it is in accord in the quotation from *U. S. v. Cunningham*, (4th Cir., 246 F. 2d 330, 333) (R. 115). The reliance upon this language, as well as its reliance upon *U. S. v. Lewis*, 308 F. 2d 453, seems wholly misplaced, because neither support the decision to be reviewed. In the first part of its opinion, it is conceded that these cases involved "ordinary farm, timber and pasture land" (R. 113), in other words, the simplest of

condemnation cases. It is more than significant that the Fifth Circuit's opinion omits any reference to the noted distinction No. 1 which the Fourth Circuit made in the very language quoted by the Fifth Circuit, namely:

> "1. The case is very different from United States v. Pendergrast, 4 Cir., 241 F. 2d 687, where the issues were *simple* and we held that the decision below could be reviewed as well without findings as with them." (Emphasis ours.)
>
> *United States v. Cunningham, (4th Cir., 1957) 246 F. 2d 330, 333, Note 1.*

This distinction was repeatedly urged upon the Fifth Circuit to no avail. *The failure to make findings as to the highest and best use or some other vital issue in the case that materially affected the ultimate finding of just compensation is present in all reversals of awards by Commissions of which we are aware.* We refer the Court to the clear thread of distinction exhibited in the following cases.

1. *U. S. v. Cunningham,* (4th Cir., 1957) 246 F. 2d 330, 333 (4-6) where no findings as to highest and best use was made, and compare *Cunningham v. U. S.,* (4th Cir., 1959) 270 F. 2d 545, 550, after findings as to highest and best uses were made.

2. *U. S. v. Bell County,* (5th Cir., 1958) 259 F. 2d 23; no findings as to highest and best use, and no findings of consequential benefits.

3. *U. S. v. Buhler,* (5th Cir., 1958) 254 F. 2d 876, 877; no findings of highest and best use.

4. *U. S. v Tampa Bay Garden Apartments, Inc.,* (5th Cir., 1961) 294 F. 2d 598 (3) (8) (9), where the Fifth Circuit refused to require specific findings as to each evidentiary conflict in the record.

5. *U. S. v. Merz,* (10th Cir., 1962) 306 F. 2d 39 (3) (4) at 42, 43, which specifically rejected the contentions of U. S. in instant cases.

6. *U. S. v. Carroll,* (4th Cir., 1962) 304 F. 2d 300 at 305, failure of Commission to find highest and best use, whether a farm for marketable sod, or for residential purposes, entirely in accord with and following *U. S. v. Cunningham,* 246 F. 2d 330.

7. *U. S. v. Lewis, Benning & Morrison,* (9th Cir., 1962) 308 F. 2d 453, which (a) rejected the contention that general objections to a Master's Report present any question for review, (Id. at p. 456). (b) points out the very distinction above set forth, citing *U. S. v. Carroll,* (4th Cir., 1962) 304 F. 2d 300 (Id. at p. 458). (c) emphasizes the distinction in the *Benning* and *Morrison* cases where highest and best use was expressly found (Id., see particularly headnote 7 at p. 460 where the Ninth Circuit expressly rejected the identical contentions of U. S. that a Commission must expressly show in its report what proof it relied on and why it chose to believe certain evidence rather than other evidence).

8. *Gill v. U. S.*, (9th Cir., 1962) 313 F. 2d 416, where the Ninth Circuit reversed the Trial Court's reduction of the Commissioners' award where the Trial Court had not viewed the land, and the Commissioners had done so, and where the Commission's report did *not find the highest and best use,* and where *specific* objections to the Commission's lack of findings as to (a) highest and best use (b) differing values as to differing portions of the land condemned, (c) comparable sales (d) severance damage, and (e) no finding with reference to available irrigation water, which modification by Trial Court, lack of findings and specific objections, are to be contrasted with instant cases. However, to the extent that the *Gill* case holds that specific objections can require detailed evidentiary findings as to comparable sales or what evidence the Commission credited and discredited or the process by which the awards were reached, it is contrary to prior decisions and the spirit and intent of Rules 52 and 53 of the Federal Rules of Civil Procedure and is unsound in this respect, and is a departure from the *Benning* and *Morrison* cases, (9th Cir., 1962) 308 F. 2d 453, at 460.

D. Finding As To Each Evidentiary Conflict Not Required.

The decision of the Fifth Circuit in the instant case quotes italics from *U. S. v. Bell County,* 295 F. 2d 23, at 29, as follows:

> "As examples of the deficiencies in the findings it may be noted that (1) *nothing is found as to*

how commissioners resolved the conflicts in the testimony, (2) no findings as to the uses of the land particularly Tract 805 and no determination as to benefits." (R. 116.)

The second and third deficiencies referred to in the above quotation were not involved in the instant cases because as to the second deficiency, namely, uses, there was an express finding, and the third deficiency, namely, benefits, was not involved. As to conflicts in the testimony, no other case of which we are aware has reversed a judgment for failing to make express findings on conflicts in opinion evidence as to value. Indeed, the prior Fifth Circuit decision in *U. S. v. Tampa Bay Garden Apartments, Inc.*, (5th Cir., 1961) 294 F. 2d 598, 606, held to the contrary when it said:

> "The Government complains that the Commission and the Court failed to make explicit findings with respect to a number of questions which it asserts are decisive. The Commission found that there was a dispute as to termite damage and that such damage was inconsequential at the time of taking. The finding is challenged and the Government contends that the Commission committed error in failing to include in its appraisal computation an amount for termite control. The Government asserts that there must be a reversal because the Commission concluded that leasehold furniture should be regarded as a short-lived facility, beneficial to the utilization of the leasehold, and consideration should be given to its effect on the gross income from the leasehold and

to the financial burden of necessary replacements. In the consideration of these and other contentions of the Government, we must not forget that the ultimate determination is to be of an amount to be awarded as just compensation to the owner of property taken by the sovereign. The measure of the award is in many, perhaps most, instances based upon opinions. The amounts to which the expert appraisers testify, the amount fixed by jurors or commissioners, and the amount determined by the court are all opinions and, as has been said, an *informed guess*. United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336. *The judicial determination of the award in a condemnation case cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula.* United States v. Cors, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 1392. *We do not think it necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts that appear in the record.* Cf. Seale v. United States, 5 Cir., 1957, 243 F. 2d 145. We do not believe that the court omitted findings on any *essential factual issues* so as to prevent this Court from determining whether the result was based upon clearly erroneous findings." (Emphasis ours.)

United States v. Tampa Bay Garden Apartments, Inc., (5th Cir., 1961) 294 F. 2d 598, 606.

While the *Tampa Bay Gardens* case was by another division of judges of the Fifth Circuit Court of Appeals,

it is noteworthy that the decision sought to be reversed studiously avoids any reference thereto although Landowners expressly contended it to be controlling in this respect. It is also worthy of note that the Tenth Circuit in *Merz*, 306 F. 2d 39 (3) at pp. 42-43 cites the *Tampa Bay Garden* case, and the Fourth Circuit case of *U. S. v. Pendergrast*, 241 F. 2d 687, referred to in the footnote No. 1 to *U. S. v. Cunningham*, 246 F. 2d 330, at 333, to which the opinion to be reviewed likewise omits any reference. The decision to be reviewed does not withstand the force of the distinction since it fails to come to grips with it.

E. Reliance By Fifth Circuit On U. S. v. Lewis (9th Cir., 1962) 308 F. 2d 453, Is Without Basis.

Next, the decision of the Fifth Circuit quotes (R. 116-117) from and relies upon *U.S. v. Lewis, supra*, as supporting its reversal in the instant cases. Such reliance is the product of failing to construe the quoted language in context.

The quoted language was in response to the Trial Court's decision that *no* findings whatever are required under Rules 52 and 53 by a Commission in condemnation cases, and holding this to be error. It was not a holding that detailed evidentiary findings as to all phases of the evidence is required by Rule 52 (a). Indeed, the language of the Ninth Circuit's decision speaks for itself, which follows:

> "There must at least be resolution of factual disputes as to the character of the property, its

highest and best use and the elements which contribute to its value; and disputes as to applicable principles of valuation."

Id. at 456.

Landowners have no argument with this language. As applied to the instant cases, there were no factual disputes as to the character of the property, nor of its highest and best use, nor of the elements which contributed to its valuation, nor as to applicable principles of valuation. Indeed the only conflicts in the evidence were conflicts in opinion evidence of value. Landowners agree that "there must be a sufficient disclosure to the reviewing Court to enable it to understand what it is that has been decided," *U. S. v. Lewis*, 308 F. 2d 453, 456, "but this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result". Id. at p. 460. Nothing in the *Lewis* case supports the Fifth Circuit decision; indeed, it entirely accords with *U. S. v. Merz*, 310 F. 2d 39.

F. Decision Presumes Without Basis Violation Of Oaths By Commissioners.

The decision of Fifth Circuit presumes illegally that Commissioners violated their oaths, disregarded instructions of Trial Court, and considered claimed incompetent evidence, in effort to sustain a strained construction of Rules 52 and 53.

The decision sought to be reversed continues:

> "On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion as to whether the sales sustain a value of $100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:
>
> "'I arrived at it like I'd price mine, just like it is; (fol. 122) that's what it would take to buy mine adjoining Hoke's.'
>
> "If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value."
>
> *R. 117-118.*

In the first place, the only reference to allegedly comparable sales in the Record are found on pages 35, par. 7, page 37, par. 1, (as to the Lindsey tract); page 46, par. 1 and 2, (as to Watson tract); and page 91, par. 1 and 2, page 92, par. 7, page 93, par. 10 and pages 95-96, par. 5, (as to the Gibson tract). In none of these cases did the U. S. offer the alleged comparable sales as direct or independent evidence but only as the basis for its witness's opinion of value. In the *Watson* case, Landowner contended that there was no comparable sale; in the *Lindsey* case, Landowner introduced only one comparable sale by W. O. Sellers; and in the

Gibson case, the Landowner introduced five sales as comparable sales, varying in price range of $75.00 to $111.00 per acre or an average of approximately $86.00 per acre.

The quoted language from the decision of the Fifth Circuit refers to a comparable sale introduced in the *Lindsey* case. The original transcripts of the evidence were before the Fifth Circuit Court of Appeals. It overlooked that this sale was in excess of $100.00 per acre. There is certainly no proof in the record or any reason to infer that the Commission arbitrarily scaled down other opinions of value. The reference to the testimony of Mr. H. P. Mason (R. 35) who was a neighbor of Mr. Lindsey and owned the adjoining tract that he arrived at his opinion of value "like I'd price mine, just like it is; that's what it would take to buy mine adjoining Hoke's" (R. 118) is not all that was in the record as to this neighbor's qualifications. See (R. 35). The transcript revealed further preliminary qualifying questions and answers which the Fifth Circuit overlooked. The holding that such an opinion is without probative value is erroneous. However, if correct, this did not require remand for detailed evidentiary findings.

An adjoining Landowner is presumably qualified to testify as to the fair value of his neighbor's land as to which he is familiar. Mr. Mason did not say that he was *not* a willing seller. He did say that $150.00 per acre was what it would take to buy his land adjoining Mr. Lindsey's land. This does not utterly destroy the

probative value of his testimony although it might affect its credibility. Actually, the fact that his land adjoined that of Lindsey and as such had similar characteristics gave substance to his opinion of value of Lindsey's condemned tract.

However, if Mr. Mason's testimony be deemed inadmissible, there was no objection to same nor any motion to strike it from the record. If it be deemed stricken, there was more than ample evidence to sustain the award. If it be deemed incompetent, and without probative value, the presumptions are (1) that the Commission considered only competent evidence, and (2) that all conflicts in the evidence were resolved in favor of the prevailing party, and (3) the reviewing Court must take that view of the evidence most favorable to the prevailing party. The following authorities support these rules of law:

U. S. v. Hirsch (2nd Cir., 1953) 206 F. 2d 289 (1);
Morris v. Williams (8th Cir., 1945) 149 F. 2d 703 (12);
Donelly Garment Co. v. N.L.R.B. (8th Cir., 1941) 123 F. 2d 215 (10);
Anglo California Nat. Bank of San Francisco v. Lazard, (9th Cir., 1939) 106 F. 2d 693 (29, 30);
Thompson v. Baltimore (8th Cir., 1946) 155 F. 2d 767 (3, 4);
Hedrick v. Perry (10th Cir., 1939) 102 F. 2d 802 (5, 14, 15);
Bailey v. Sears Roebuck & Co. (9th Cir., 1940) 115 F. 2d 904 (8);
U. S. v. Foster (9th Cir., 1941) 123 F. 2d 32 (1);

Stone v. Farnell (9th Cir., 1956) 239 F. 2d 750 (9, 18, 19);

Stacher v. U. S. (9th Cir., 1958) 258 F. 2d 112 (3);

U. S. v. Comstock Extension Mining Co. (9th Cir., 1954) 214 F. 2d 400 (4);

Freightways, Inc. v. Stafford (8th Cir., 1955) 217 F. 2d 831 (9);

Judd v. Wasie (8th Cir., 1954) 211 F. 2d 826 (2) (3) (5);

Peterson v. Denevan (8th Cir., 1949) 177 F. 2d 411 (1) (2);

Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co. (6th Cir., 1940) 110 F. 2d 192 (10);

Wingate v. Bercut (9th Cir., 1945) 146 F. 2d 725 (2).

G. The Decision Overlooked All Rules Of Construction Of Findings.

"It is not the function of this Court to retry cases on appeal. Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. F.R. Civ. P. Rule 52 (a), 28 U.S.C.A. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to *overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous.* Appellant has not carried the burden as to any particular challenged finding sufficiently to require or justify a detailed analysis of the evidence, particularly in view of the exhaustive study and discussion of the facts contained in the trial

court's written memorandum." (Emphasis ours.)

Glens Falls Indemnity Company v. United States, 229 F. 2d 370, 373 (9th Cir., 1955).

To same effect:

U. S. v. Yellow Cab Co., (1949) 338 U.S. 338 (1) (2) (4), 70 S. Ct. 177;
Travelers Insurance Company v. Dunn, (5th Cir., 1956) 228 F. 2d 629, 630, 631;
Zimmerman v. Montour Railroad Company, Inc., (3rd Cir., 1961) 296 F. 2d 97;
Blumenthal v. U. S., (3rd Cir., 1962) 306 F. 2d 16 (1);
Switzer Brothers, Inc. v. Locklin, (7th Cir., 1961) 297 F. 2d 39;
U. S. v. Foster, (9th Cir., 1941) 123 F. 2d 32;
Stone v. Farnell, (9th Cir., 1956) 239 F. 2d 750;
Rapid Transit Company v. U. S., (10th Cir., 1961) 295 F. 2d 465, 467.

"Findings of the trial court 'are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn.'"

5 Moore's Federal Practice, pp. 2660, 2661.

The decision impresses upon an appellate court a supervisory role over findings of fact, which is not the scope of an appeal. What the U. S. sought in the instant cases is a retrial on an appellate level, and the decision of the Fifth Circuit, in effect, adopts such a procedure, contrary to authority, and clearly violative

of the requirement of Rule 52 that findings not be set aside unless clearly erroneous.

Taking each objection of U. S., Landowners specify the following fatal defects:

Objection No. 1—(R. 108) Failed to order Commissioners to make complete findings of fact and conclusions of law. The objection fails to specify in what respects the findings and conclusions were incomplete or inadequate. Therefore, this is not entitled to be termed an objection in the first instance.

Objection No. 2—(R. 108) Findings were inadequate to determine *basis* on which the awards were made. Again, if the U. S. was trying to state that the findings were inadequate in that they did not state what evidence the Master believed and disbelieved, it should have said so in express language. The objection as phrased is so vague as to raise no question for review. An award can only be based upon evidence and the view of the land as an aid in the weighing of the evidence. The Commission summarized the evidence before it. Had the objection been sufficiently specific, it would have been without merit, since under the law cited herein, such findings are not required.

Objection No. 3—(R. 108) Reports showed conflicts in the evidence but do not show how these conflicts were resolved. The specific conflicts were not identified. Of course, there were conflicting opinions as to value. Of course there were conflicting contentions

as to whether Landowners' sales were comparable. It is manifest, however, that the Commission (1) rejected the opinion of the Appellant's expert witnesses and the allegedly comparable sales on which they were partially based since their opinions and the allegedly comparable sales were thoroughly discredited on cross examination, and (2) did not accept as correct any opinion evidence, or any sale as identical, but arrived at its own independent finding of value after weighing all the evidence. This it not only had a right, but was under a sworn duty to do.

If Rule 52 (a) required the Court to state what evidence it credited and what evidence it discredited, it is not reversible error not so to do if the Trial Court's judgment leaves no doubt as to what evidence the Trial Court accepted in rendering its award. See *Hazeltine Corporation v. General Motors Corporation*, (3rd Cir., 1942) 131 F. 2d 34 (5).

Applying the foregoing principle to the instant cases, the decision of the Fifth Circuit violates this rule of law. From the summaries of the evidence recited in the Master's Reports (R. 33-38, *Lindsey* case; R. 43-47, *Watson* case; and R. 91-96, *Gibson* case), the following conclusions are apparent. In the *Lindsey* case, the opinions of the Landowners' witnesses ranged from $90.00 to $150.00 per acre; the U. S. witness testified to approximately $59.00 per acre; the Master found $100.00 per acre. In the *Watson* case, the range of Landowners' witnesses opinions of value was $130.00 to $240.00 per acre; the two Government witnesses

testified to $87.50 and $94.00 per acre value; and the Commission found approximately $160.00 per acre. In the *Gibson* case the opinions of Landowners' witnesses rang d from $83.00 to $100.00 per acre as to the River Land; from $60.00 to $85.00 per acre as to the lands east of the Highway or the uplands, and an average overall value per acre of approximately $81.00; the Government's witness testified to an average value of $43.00 per acre and assigned a value of $50.00 per acre to the River Land and $35.00 per acre to the upland; the Commission found approximately $81.00 per acre. The only conclusion that can be drawn from the foregoing is that the Commission in each case rejected the opinion values of the Government witnesses and the claimed comparable sales upon which they were based. That the awards more nearly approximated the average opinion values of Landowners' witnesses impeaches neither the impartiality nor the correctness of the findings. *U. S. v. Yellow Cab Co.*, (1949) 338 U.S. 338 (1), 70 S. Ct. 177.

H. The Decision Erroneously Entrenches Upon The Prerogative Of The Trial Court To Determine Adequacy Of Findings In The First Instance.

The decision states that "In order that District Court may review the Commissioners, it must be able to determine whether the Commission adopted the correct legal principles, and whether the evidence met the standard of substantiality to withstand a reversal by the district court. (R. 118.)

There is nothing in the Record to suggest that the Trial Court did not deem himself capable of reviewing the awards of the Commissioners because of inadequacy of findings. Further, there is nothing in the Record to suggest that the Commission adopted erroneous legal principles in arriving at its awards. The trial judge adopted the reports after reviewing the transcript of the evidence. The Fifth Circuit did not review the transcripts of the evidence. In adopting the reports of the Commission the Trial Court determined that the awards were supported by substantial evidence. The inference from the above quotation is that the Trial Court, in reviewing the Commission, must search the souls of the Commissioners and cross examine them to determine if they violated the instructions of the Trial Court, even without the remotest suggestion by the U. S. Such is not the proper scope of review, either by the Trial Court, or by an intermediate Court.

> "In condemnation proceedings involving determination of real estate values, court of review may only check the general processes on which the result rests, to see that they do not indicate such arbitrariness as would make the trial and its result a violation of due process."
>
> *Phillips v. United States, (2nd Cir., 1945) 148 F. 2d 714 (4).*

The decision of *U. S. v. Leavell & Ponder, Inc.*, 286 F. 2d 398, quoted by the Court of Appeals (R. 118) is not only not in point; it does not even relate to any issue before the Court of Appeals in the instant cases.

The language used in the opinion in *Leavell and Ponder, Inc.* case, *supra*, emphasizes the clear thread of distinction noted heretofore. It reads:

> "The figure (condemnee's net gain) arrived by the Commissioners would much better have been supported by subsidiary findings of fact. At least a finding as to the need for replacing the cash reserves for depreciation for short-lived equipment would have been almost essential to an understanding of the figure. Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum. See United States v. Buhler, 5 Cir., 254 F. 2d 876, 882. Moreover, the commissioners erred in assuming that the total would have been received in one lump sum at the end of the 43 years. It is perfectly clear from the record that any computation based on such assumption would be erroneous, since the rentals are payable over the life of the lease."
>
> *United States v. Leavell & Ponder, Inc., (1961) 286 F. 2d 398, 406.*

This case involved a complex condemnation of a Wherry Housing Lease, and the need for replacing cash reserves for depreciation of short-lived equipment materially affected the condemnee's net gain figure (as to this key subject no finding was made); and in addition, the Commission assumed the receipt of this net gain at the end of the 43 year term, whereas the rentals were payable over the life of the lease. That case is to be contrasted with the simplicity of the instant cases.

Generally speaking, where the subject being valued is ordinary farm land, the appellate court is not concerned whether the award is a product or a sum of the elements. It generally is concerned only with errors or law, insufficiency of the evidence to support the award, or whether the findings made were within the range of competent evidence.

The decision sought to be reversed quotes general language from *U. S. v. Forness*, 125 F. 2d 928, 942, as to the purpose served by findings of fact, as aiding in the process of decision. The *Forness* case dismissed a complaint for cancellation of a lease for nonpayment of rent, and the trier of fact made no independent findings of fact but included the proposed findings and objections in the record, which the Second Circuit condemned as a bad practice. It is not remotely in point.

Finally, the decision concludes that in order for the reports to meet the standards prescribed, the judgments are reversed and the cases are remanded to the Trial Court for resubmission. A casual reading shows that no standards are prescribed in the opinion. In fact, the opinion is much more vague than the reports which it purports to criticize. The opinion in the final analysis, is a collection of general quotations that adds only confusion to the proper interpretation and application of Rules 52 and 53. It destroys the utility of Commissions, and imposes an intolerable burden on

trial judges to take each piece of evidence and say "I believed this witness, I didn't believe that witness, I paid little attention to that witness." Of course, the trial judge must then add why he chose to do so. Instead of findings of fact, the decision makes "for scrambled eggs instead of chicks", aside from its ignoring the importance of and requirement of the rule that due allowance be made for (1) the pre-eminence of the Trial Court to determine credibility of witnesses and (2) the importance of the view of the land which placed the Commissioners in a position to weigh the testimony which the Trial Court did not enjoy and as to which the decision of the Fifth Circuit chooses to disregard.

Landowners respectfully pray that the decision of the Fifth Circuit Court of Appeals be reversed. It is in conflict with *U. S. v. Jacobs*, (5th Cir., 1962) 308 F. 2d 906 (2) and even *Leonard M. Bernes v. Edward J. Henning*, 310 F. 2d 127, decided by the same judges who decided the instant case which held:

> "Where only issue on appeal was one of fact, and reviewing court could not determine that judgment of trial court approving findings of special master was clearly erroneous, judgment would be affirmed."
>
> *Leonard M. Bernes v. Edward J. Henning, (5th Cir., 1962) 310 F. 2d 127.*

The plain departure from established law by the decision of the Fifth Circuit is made obvious by the even more general language:

"We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based."

R. 117.

There was only one contested issue—namely just compensation. The only subsidiary facts involved were:

(1) Fair market value of land taken,

(2) Severance damage to remainder of tract not taken,

(3) Value of flowage easements,

(4) In the *Lindsey* case, severance damage to his homeplace which was not contiguous to the land taken; and

(5) In the *Watson* case, whether the land was valuable for residential purposes.

Findings of these subsidiary facts were made. Whether a factfinder accepts a witness's opinion of value as credible or accepts a sale as comparable is

not a subsidiary underlying ultimate fact, but a part of the process of decision, or reasoning on the evidence and its effect.

CONCLUSION.

"There can be no doubt that the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception. To entitle himself to relief from a verdict, order or judgment, a party must show that his case is within the exception. Error is not to be presumed but must be affirmatively shown. And the appellate courts will disregard harmless errors and reverse only for errors prejudicial to substantial rights of the parties. Thus in Palmer v. Hoffman, Mr. Justice Douglas pointed out that 'Mere "technical errors" which do not "affect the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.' And in Commercial Credit Corp. v. United States, Chief Judge Gardner, for the Eighth Circuit, observed that 'Error is not ground for reversal unless it be prejudicial. It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant.'"

7 Moore's Federal Practice, p. 1032, § 61.1.

As Justice Cardoza once stated:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."
>
> *United States v. Swift & Co., (1932) 286 U. S. 106, 119, 52 S.Ct. 460, 464.*

This Court has recognized the requirement of harmful error on numerous occasions. Two such statements of the rule follow.

> "Mere error is not enough to require reversal of the judgment if the record discloses that no injury could have resulted therefrom."
>
> *Carlisle Packing Co. v. Sandanger, (1922) 259. U. S. 255, 42 S. Ct. 475 (2).*

> "To warrant the reversal of a judgment, there must be not only error found in the record but the error must be such as may have worked injury to the party complaining."
>
> *Decatur Bank v. St. Louis Bank, 88 U. S. 294, 21 Wall 294, 22 L.Ed. 560.*

Had the Fifth Circuit followed the above maxims, and, indeed, had it followed its own prior decisions on

the subject, it could only have affirmed the judgments. We respectfully request this Court to reverse the decision of the Fifth Circuit and reinstate the judgments of the Trial Court.

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CERTIFICATE OF SERVICE.

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the .... day of August, 1963, I served copies of the foregoing Brief for the Petitioners to the United States Court of Appeals for the Fifth Circuit on the United States of America, Respondent, as follows:

1. By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,
Assistant Attorney General,
Washington, D. C.

Messrs. S. Billingsley Hill and Hugh Nugent,
Attorneys, Department of Justice,
Washington, D. C.,

Mr. Floyd M. Buford,
United States Attorney,
Macon, Georgia.

and, by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

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OCTOBER TERM, 1963

No. 79

2,872.88 ACRES OF LAND, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 112) is reported at 310 F.2d 775.

JURISDICTION

The judgments of the court of appeals were entered on December 5, 1962 (R. 119-120). A timely petition for rehearing was denied on January 3, 1963 (R. 121). The petition for a writ of certiorari was filed

on February 21, 1963, and was granted on April 22, 1963 (R. 122). 372 U.S. 975.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an eminent domain proceeding, a district court may adopt the reports of a commission it has appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the issue of just compensation, if the reports fail to show the basis upon which the commission's awards were made and how the commission resolved major conflicts in testimony.

2. Whether, under Rule 53(e)(2) of the Federal Rules of Civil Procedure, objections to the merits of a condemnation commission's awards must be joined with objections to the inadequacy of the report, if the report, as filed, fails to disclose the basis for the awards.

RULES INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (e) Report.
>
> * * * * *
>
> (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of

[1] At the same time, certiorari was granted in No. 65, *United States* v. *Merz*, 306 F.2d 39 (C.A. 10), 372 U.S. 974.

the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Rule 71A of the Federal Rules of Civil Procedure provides, in pertinent part:

(h) Trial.

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and

report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

These condemnation suits are part of the land acquisition program for the Walter F. George Lock and Dam Project on the Chattahoochee River in Georgia and Alabama. Three series of tracts are involved. The first, known as the Lindsey property, concerns approximately 1015 acres taken in fee and four perpetual flowage easements over tracts ranging from 1.80 to 3.40 acres (R. 32-33). The second, belonging to petitioner Watson, involves about 330 acres taken in fee and a perpetual flowage easement over another 7.58 acres (R. 41). The third, belonging to the Gavin family, relates to approximately 1345 acres taken in fee, four perpetual flowage easements over tracts varying from 2.07 acres to 10.79 acres, and four perpetual road easements over tracts ranging from .8 acres to 5.8 acres (R. 90). Notwithstanding the government's demand for a jury trial of the issue of just compensation (R. 7, 75), the district court referred that issue to a commission pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure. The commission was given instructions by the district court on how to proceed and what to consider (R. 18, 21-26).

The commissioners viewed the property, held hearings, and filed their reports. The three reports followed the same pattern (R. 32-40, 41-49, 89-99):

(1) Each began with a notation as to the times and places when the hearings were held; (2) This was followed by a brief statement listing the owners of the land and the interests which were taken in fee or subjected to easements; (3) Next came a summary of the evidence, consisting mainly of capsule resumes of the testimony of all witnesses, including references to the bases of their valuations and the figures to which they testified; (4) "Findings of Fact" followed. These set forth who owned the land, its highest and best use, the acreage remaining after the taking and the amount of severance damage to it, the value of the fees taken and of each easement, and the total awards; (5) Each concluded with "Conclusions of Law," which stated that the United States had the right to take the land, that the landowners were entitled to just compensation including severance damages, and that the commission had jurisdiction to determine the amount of just compensation. In the report pertaining to the Gavin property, the commission also overruled, in a "Conclusion of Law," government objections to evidence of a comparable sale offered by the landowners (R. 99, Par. 4).

The government filed objections to each of the reports, including the following, *inter alia* (R. 50, 53, 100):

> 1. The Report does not contain sufficient specific findings as to the matters on which the Commissioners based their valuation.
>
> 2. The Report does not sufficiently set forth the principles of law which the Commissioners applied in arriving at their conclusion as to value.

The government also objected on the ground that the awards were excessive, that they were outside the range of the testimony and against the weight of the evidence, and that they showed that the commissioners disregarded recent sales of similar properties (R. 50, 53, 100). Each set of objections also specified some particular testimony which was erroneously admitted into evidence by the commissioners and observed that it was "impossible to determine to what extent, if any, this testimony entered into the Commissioners valuation" (R. 51, 53, 100).

The district court overruled the objections and adopted the reports, saying in each instance that it had carefully considered the "report, objections and briefs" (R. 55, 56, 102). The court then entered judgments for the amounts awarded by the commissioners (R. 57, 60, 103). The government appealed, specifying as error the district court's adoption of the commission's inadequate reports (R. 108-109).

The court of appeals noted that the reports did not indicate (1) which evidence the commission credited and which it discredited, (2) to what extent the awards were based on testimony of comparable sales, (3) whether sales were in fact comparable, and (4) to what extent the awards depended on the opinions of non-expert witnesses (R. 114). It held that a commission's report must contain "sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based." (R. 117). Accordingly, the court of appeals remanded the cases "for resubmission in order that the commissioner's reports may

meet the standards prescribed" in the court's opinion (R. 119-121).

SUMMARY OF ARGUMENT

I.

For the reasons elaborated in our brief on the merits in *United States* v. *Merz*, No. 65, a condemnation commission's report does not satisfy the standards of the applicable Federal Rules of Civil Procedure if it fails to state the facts and the law upon which the commission's award is based. A district court with which such a report is filed is obliged to recommit the case to the commission for more complete findings. Although the reports of the commission in the present case summarized the evidence, they contained no findings as to particular determinative facts on which testimony conflicted. Nor did they demonstrate the use to which the commission had put testimony of comparable sales. Consequently, it was impossible for the district court to review the awards pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure in order to determine whether they were "clearly erroneous," and the court of appeals was correct in remanding the case so as to obtain adequate findings.

II.

Since the commission's reports were conclusory and gave no indication as to the method or the reasoning by which the awards were made, it was impossible for the government to do more in the district

court than to challenge the form of the reports and object generally to the size of the awards. In the absence of any indication of the commission's *ratio decidendi*, there was also no cognizable legal basis upon which to contend in the court of appeals that the awards were excessive, or that they could not reasonably be derived from the evidence.

ARGUMENT

I.

The Commission's Reports Failed To Articulate Subsidiary Findings and Legal Reasoning With Sufficient Particularity To Permit Meaningful Judicial Review

In our brief on the merits in *Merz* v. *United States*, No. 65 (pp. 14-24), which has been supplied to petitioners in this case, we elaborate the reasons why a condemnation commission must include in its report findings "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion * * * can rationally be predicated." *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 420. The reports in the present case did not meet this standard, and their deficiencies could not be filled by the district court. (See *Merz* brief, pp. 26-30.) Consequently, the court of appeals was correct in directing that the case be remanded to the commission for adequate findings.

A. *Conflicts in testimony were not resolved.*

The reports in the present case are strikingly similar to those in *Merz* in every respect but one. Like the reports in *Merz* they include a recitation of many

undisputed facts, some of which were totally unrelated to the commission's single function of determining just compensation—*i.e.*, the names of the landowners, the precise date of the taking, the location of the tracts, the highest and best use of the land, and the interests taken. The reports also include legal conclusions on incontrovertible propositions—*i.e.*, that the United States was entitled to condemn the land, that the landowners were entitled to just compensation, and that the commission had jurisdiction to determine the amount of the compensation.

In one respect the reports are more complete than were those in *Merz*. Unlike the *Merz* reports, the commission's reports in the present case summarize the testimony of the witnesses who appeared before it (R. 33-38, 42-47, 91-96). Such summaries are desirable components of commission reports both because they disclose to a reviewing court, compendiously, the evidence which was before the commission, and because they focus the attention of the commissioners on the evidence presented to them. (See *Merz* brief, pp. 21-23.) But the requirement that the commission submit full findings to the district court, which is implicit in Rules 71A(h) and 53(e)(2) of the Federal Rules of Civil Procedure, is not satisfied by a mere summary, particularly when, as here, the summary discloses that there were major conflicts in the testimony. Only the commissioners know how the conflicts were resolved, and only by knowing the commissioners' resolutions of the conflicts, and the inferences based upon them, can a district court or a court of

appeals meaningfully examine the commission's conclusions and determine whether they were warranted by the evidence or were "clearly erroneous."[2]

An analysis of the three reports in issue in this case discloses substantial differences in testimony as to which the commission failed to articulate conclusions. It also demonstrates that the commission must have committed errors which cannot be precisely identified because of the generality of its findings.

(1) The *Lindsey* property.—The land taken in fee was valued by the landowner at $140 an acre and by other lay witnesses who testified in his behalf at $110 to $150 per acre (R. 34-35). The landowner's expert witness testified, according to one computation, to a value of approximately $85 per acre (R. 36). The government's expert witness valued the land at approximately $56 per acre (R. 37). While making no specific finding either as to the per-acre value of the property or as to the total value of the full parcel from which the condemned tract was taken, the commission entered an award for the fee interest of approximately $94 per acre (R. 39).

Another element of the award was severance damages to the parcel of land remaining after approxi-

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[2] We note here, as we did in the *Merz* brief (p. 27, note 14), that the proper standard by which the court of appeals should review commission-tried condemnation cases is by determining whether the *commission's* findings are "clearly erroneous." Judge Tuttle's statement to the contrary in the present case (R. 118) should be compared with his dissent in *United States* v. *Twin City Power Co. of Georgia*, 253 F.2d 197, 205 (C.A. 5), which states what appears to us to be the correct rule.

mately two-thirds of the original property had been taken. The landowner contended that not only did the taking leave the remainder of the property "over-improved" and deprive it of its water supply, but that his "home place," an 86-acre tract which was four miles away, was damaged in the amount of $15,000 (R. 34). Other supporting lay witnesses testified that the remaining 500-odd acres had been reduced in value by amounts ranging from $45 to $70 per acre (R. 35). The landowner's expert witness testified to $26,635 in severance damages, of which $14,200 was attributable to the alleged reduction in value of the landowner's home place (R. 36). The government's expert valued severance damages at $1,825 in all, making no allowance for the alleged damage to the home place but including an estimate for fencing and necessary road construction (R. 37). The commission found specifically that no damage had been caused to the home place (R. 38), but it nonetheless set severance damages at $15,785 (R. 39). How it arrived at this figure was not disclosed, but it was obviously in excess of the estimate set by the landowner's expert, whose severance figure, apart from damage to the home place, would have come to $12,435. Nor did the total figure reveal whether the commission had considered fencing and road construction costs.

Since the commission's report regarding the Lindsey property did not state on whose testimony the commission relied, or whether it arrived at its estimates by a compromise method, it is impossible to pinpoint the error in the commission's award. However, it is

certainly a fair supposition, as the court of appeals observed, that the commission gave substantial credence "to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case" (R. 114). The bare fact that the awards for the fee interest and for severance damages to the remainder exceeded the valuation given by the landowner's own expert indicates as much.

(2) The *Watson* property.—The landowner's expert witness testified that he could find no comparable sales by which to evaluate the 330-odd acres which were taken in fee from an original parcel of approximately 400 acres (R. 41, 43, 48). Basing his valuation on his general experience and on the productivity and rental value of the property, he valued the *full* 400 acres at $52,500 (R. 44). In another computation he assessed the tract which was taken in fee at $36,125 to which he added $12,700 for improvements (R. 44). The landowner testified that the full 400-acre parcel was worth $96,000 before the taking, and that what was left was worth only $2,800 (R. 45). He also valued improvements separately at $34,430 (R. 45). Two lay witnesses testified to values of approximately $200 per acre (R. 44-45). The government's experts did not value improvements separately. Their estimates, based upon five comparable sales, assessed the fee interest at approximately $34,500 and $33,000 (R. 46-47). The commission made no separate find-

ing as to the value of the improvements, nor did it mention whether it had considered the value of improvements as an element in its award for the fee interest. The commission also failed to state whether it accepted the government expert's comparable sales or whether it agreed with petitioner's expert that there were no sales that could be considered comparable. It awarded $52,950, a sum in excess of the valuation placed on the *full* 400 acres by the landowner's expert witness, as compensation for the taking of approximately 330 acres (R. 48).

The commission separately awarded $3,500 for severance damages to the remainder of the 400-acre property (R. 48). The only testimony concerning severance damages which is reflected in the reports was that of the landowner's expert, who gave a combined figure of $1,275 for the value of the easement and severance damages (R. 44), and that of the government's experts, who assessed severance at $225 and $250 (R. 46-47). Here too, the commission's failure to make any express finding as to the witnesses on whom it relied conceals the probability that its award was based largely on the testimony of those who lacked the knowledge needed for a reliable judgment.

(3) The *Gavin* property.—The land taken in fee was composed of approximately 435 acres west of Georgia Highway 39 and about 900 acres east of the highway (R. 92-93). Five of the landowners' lay witnesses (R. 92-95), one of the landowners (R. 93), and the landowners' expert (R. 94) all testified that the property west of the highway was more valuable

than that east of the highway. Nearly all of the lay witnesses valued the property west of the highway at $100 per acre, but the landowners' expert assessed it at $83 per acre (R. 94). The value of the land east of the highway was estimated by the landowner at $85 per acre, by the lay witnesses at $60 to $80 per acre, and by the expert at $65 per acre. The expert's estimate of the total value of both parcels came to $93,693 (R. 94). The commission's award, which was a blanket figure of $105,080 (R. 97), exceeded this valuation, as well as the government expert's valuation of $56,100 (R. 96). The Commission did not indicate whether it had considered the two parcels separately and valued them differently, adding the results together, or whether it had valued them as a unit, as had the government expert. Nor did the report reveal whose testimony the commission had adopted on the per-acre value of the property.

The commission also awarded severance damages of $4,480 for four remaining parcels totaling about 225 acres (R. 97). There was no indication in the report whether this amount was based on a per-acre estimate, whether it may have rested upon the testimony of one witness that severance damages should be doubled if the land were to become "water sogged" (R. 92), whether it was the result of the landowner's estimate that the remaining land would depreciate by 25 percent of its value (R. 93), or whether it was produced by the testimony of the landowner's expert that severance damage should equal 10 percent of the value of the land plus the cost of fencing (R. 94). Indeed, there is nothing in the report to reveal whether the commission took any account what-

ever of the cost of fencing the remaining property, which had been estimated by the landowners and their witnesses at costs ranging from $3,000 to almost $4,500 (R. 93-95).

In summary, all three reports left unanswered most of the significant questions raised by conflicting testimony. Because there was nothing in the record before the district court informing it on what basis the commission arrived at its findings, that court could not perform its prescribed function of determining whether the findings were clearly erroneous. The district court was not given the slightest clue as to why the commissioners selected the figures they did instead of others for which there was supporting evidence. The most reasonable inference was that, for some unstated reason, the commissioners improperly rejected the testimony of all experts—both the government's and the landowners'—and relied primarily on valuations given by the landowners and other minimally qualified witnesses. The commission, which consistently awarded more than the landowners' experts estimated, apparently abandoned the testimony of those witnesses who displayed real familiarity with market conditions and relied instead upon the word of lay witnesses, some of whom owned land taken in the same project. Opinion evidence by an unqualified witness should have been disregarded, but the results reached in these cases suggest that such evidence was given substantial weight.

B. *Comparable sales were neither accepted nor rejected.*

Petitioners acknowledge (Brief, pp. 45-46) that "truly comparable sales * * * are the highest and best evidence of market value." As stated in *Baetjer* v. *United States*, 143 F.2d 391, 397 (C.A. 1), certiorari denied, 323 U.S. 772: "What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available." Consequently, it is only "in the absence of such sales" (*United States* v. *13,255.53 Acres of Land in Burlington & Ocean Counties*, 158 F.2d 874, 876 (C.A. 3)), that opinion evidence should be given weight in determining just compensation. The reports in this case, which do not evaluate the evidence of comparable sales, afforded the district court no means of determining whether the commissioners properly relied (or unduly relied) upon other evidence.

All three reports mention testimony by government experts about comparable sales (R. 36-37, 45-46, R, 95-96), but none indicates whether the commission accepted the sales as comparable or whether it thought that they supported the values based upon them. The landowners offered no evidence of comparable sales with respect to the Watson property, one allegedly comparable sale regarding the Lindsey property, and five with respect to the Gavin property. The Watson award of $52,950 exceeded by at least $18,125 the higher of the two opinions offered by government experts on the basis of comparable sales (R. 45-46). The Lindsey report does not show the price of

acreage of the landowner's one comparable sale (R. 35), but it does demonstrate that the award of $112,615 exceeded by $53,990 the sole opinion based on comparable sales (R. 36-37). It seems clear, therefore, that the Watson and Lindsey awards did not represent market value based on comparable sales.

Nor did the five sales offered by the Gavin landowners support the award in that case. Four of the five sales were of tracts ranging in size from 120 to 202.5 acres (R. 91), and the condemned tract consisted of some 1345 acres (R. 90). The commission's report gave no indication whether sales figures were adjusted in order to make these four transactions comparable to the sale of a tract at least six times the size of the allegedly comparable parcels. Moreover, there was no clear statement in the summary of testimony or in the findings whether one of these tracts was 135 or 160 acres—a difference which would cause the price per acre to vary some 20 percent (R. 91). The fifth comparable sale relied upon by the landowners was of comparable size, 1432 acres, but the report reflects some confusion as to the price (R. 92). At best, the selling price in that transaction was $63 or $73 an acre—a valuation which clearly fails to support the more-than-$75-per-acre award. And the $105,080 award substantially exceeds the only opinion based upon comparable sales (R. 95-96). In light of these circumstances, it is not surprising that the Fifth Circuit wondered whether comparable sales supported the awards (R. 117-118).[3]

[3] Petitioners twice allude to the fact that when they used comparable sales, they offered them as direct evidence of

Since comparable sales are the best evidence of market value and are to be prefered over other evidence, the commission's reports should disclose whether evidence of comparable sales was accorded the preference to which it is ordinarily entitled. If it was not, then the reports should show why it was rejected. In short, we submit that in determining fair market value, the commissioners either must rely on the comparable sales evidence or must reject it for specific reasons before giving substantial weight to any other evidence. Only if the court knows what the commission's reasons are can it tell whether they are legally adequate. Cf. *United States* v. *Lowrie*, 246 F.2d 472 (C.A. 4).

C. *Findings of "preliminary and basic facts" are necessary for meaningful judicial review of condemnation cases.*

Petitioners contend that the commission's reports need articulate only "ultimate facts" in order to satisfy Rules 71A(h) and 53(e)(2) of the Federal Rules of Civil Procedure (Brief 10-33). If the words "ulti-

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value, whereas the government used them only in support of an expert's opinion of market value (Brief, pp. 6, 58). At a third point, they say that "there was nothing else for the Commission to consider save opinion evidence and the comparable sales introduced by Landowners * * *" (Brief, p. 31). If the commissioners thought, as petitioners obviously do, that they must ignore the government's comparable sales, because they were introduced in the course of testimony by an expert witness and used as a basis for his expert valuation, their reports should have said so. This would have raised a legal issue which could be judicially determined on its merits.

mate facts" mean the end product of the factual inquiry—*i.e.*, the factual conclusion based upon a number of resolutions of factual conflicts and inferences therefrom—this proposed standard is clearly contrary to this Court's holdings regarding the adequacy of findings for judicial review. The standard prescribed in *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 420, is that findings should be made "in such detail and exactness as the nature of the case permits, *of subsidiary facts* on which the ultimate conclusion * * * can rationally be predicated." (Emphasis added.) The necessity for more than an ultimate award was demonstrated in *Hatahley* v. *United States*, 351 U.S. 173, in which an aggregate damage award was vacated because it was "totally inadequate for review." 351 U.S. at 182. And in *Dalehite* v. *United States*, 346 U.S. 15, 24 n. 8, this Court warned, "Statements conclusory in nature are to be eschewed in favor of statements of the *preliminary and basic facts* on which the District Court relied." (Emphasis added.)

Findings of "preliminary and basic facts" are imperative for adequate review of the awards of condemnation commissions. The only matter before the commission is the question of just compensation. When a fee interest has been taken, the "ultimate" question for the commission to decide is the market value of that fee interest. If the commission were able to satisfy its obligation to make findings simply by entering a figure which is within the range of the testimony, it would thereby render its award totally immune from effective judicial review. Obviously,

it was not the intention of the draftsmen of Rule 71A(h), who contemplated that the commission would make findings and that these would be reviewed judicially in accordance with the standards of Rule 53 (e)(2), to leave commissioners so completely at large.

A requirement that "preliminary and basic facts" be stated in commission reports does not mean that commissions will have to set out evidentiary fact findings in infinitesimal detail. Authorities cited by petitioners in which the governing principle has been stated in terms of "ultimate facts" have used these words to distinguish findings on significant and pertinent matters from those relating only to evidentiary detail. The guideline as to the adequacy of findings is whether they provide a sufficiently informative explanation of the premises upon which the commission acted and the inferences it drew to enable the reviewing court to conduct an intelligent examination of the validity of the commission's conclusions.

Petitioners stress the simplicity of the issues in the three cases here involved. We agree that the valuation of "ordinary farm, timber and pasture land" should not present serious difficulties. Nonetheless, the parties went to trial with vast differences as to valuation. (See pp. 10-15, *supra*.) In order to determine whether the commission's approach to these differences was correct under existing principles of law and whether its conclusions were based upon the evidence, a reviewing court would need more information than the commission provided here.

It is true that what is an "ultimate fact" in one context might not be an "ultimate fact" in another.

In certain kinds of cases involving masters appointed under Rule 53, questions of valuation might arise which, perhaps, might appropriately be resolved without subsidiary findings.[4] But what might be true of masters is not necessarily true of condemnation commissions. Petitioners labor under the misapprehension that a condemnation commission is merely a group of three masters who determine just compensation in eminent domain cases. If the draftsmen of Rule 71A(h) had intended such a result, they would have provided expressly for the trial of the issue of just compensation before three masters. Instead, Rule 71A(h) establishes a unique system which can operate fairly only if appropriate safeguards are applied to prevent abuse. A necessary safeguard is the requirement that commissions make findings on "subsidiary" and "basic facts."

II.

Objections To the Merits of the Awards Could Not Be Made So Long As the Basis for the Awards Was Undisclosed

A. *Only general objections could be made in the district court.*

Petitioners contend (Brief, pp. 34-39) that despite the unrevealing form of the commission's reports, the government was required by Rule 53(e)(2) to file specific written objections to the merits of the awards in the district court. The failure to file such specific

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[4] But see our brief in *United States* v. *Merz*, at p. 18, note 10.

objections is asserted as grounds for rejection of the government's principal contention that the reports were inadequate.

Rule 53(e)(2) provides that "[w]ithin 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties." Although permissive in tone, this clause apparently requires objections to be filed within the prescribed time in order to be preserved.

It would be most unreasonable, however, to read Rule 53(e)(2), as petitioners suggest, to require the filing of specific objections to the *merits* of a condemnation commission's award if the report fails to disclose how the commission arrived at the award. Any challenge to the merits of an award would then have to be based upon speculation as to what might have caused the commission to reach the result it did. The only sensible avenue open to the government under these circumstances was to do what it did—*i.e.*, challenge the adequacy of the report's findings and allege generally that the awards were erroneous (R. 50-51, 53, 100).

The anomaly which results from petitioners' proposed rule is best illustrated by considering an extreme hypothetical case. If, for example, a condemnation commission were to file a report containing an award without holding a hearing or giving any of the parties an opportunity to present evidence, the report would obviously be improper and should not be adopted by the district court. The parties would be unable, however, to make any specific objection to the size of the award since they would not know how the

commission had determined it. It hardly seems necessary to observe that a bare objection to the commission's procedure and to the fact that its award was reached without the presentation of evidence would be sufficient to sustain its rejection.

Similarly, when the commission fails to articulate its grounds of decision, a general objection based upon this omission must be adequate to satisfy Rule 53(e)(2).[5]

B. *It was unnecessary to challenge the merits of the awards in the court of appeals.*

Petitioners also contend (Brief, pp. 39-42) that the government's failure to challenge the size of the awards in the designation of points on appeal renders the case moot. This argument was also made in the court of appeals, where it was rejected as being "without merit" (R. 113).

The contention is patently frivolous. First, the same reasons which prevented the government from making specific objections in the district court (pp. 21-22, *supra*) continued so long as the commission did not state the premises of its decision. Hence the only cognizable legal ground upon which an appeal

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[5] To the extent that there is any intimation to the contrary in *United States* v. *Lewis*, 308 F.2d 453 (C.A. 9), we think that case was wrongly decided. The court there appeared to say that objections to the adequacy of a report must specify in what manner the report was inadequate. Since a conclusory report conceals the basis of a commission's award, it is often difficult or impossible to pinpoint the particular inadequacy other than by drawing to the court's attention the fact that the report is conclusory in form.

could be based was the commission's failure to meet its obligation to make findings. Second, even if the effect of the government's failure to challenge the merits of the awards in its statement of points on appeal was to permit the court of appeals to refuse to consider any such contention if it was belatedly asserted, see *Jesionowski* v. *Boston & Maine R. Co.*, 329 U.S. 452, 458-459, it surely did not affect the court's power to pass on other specified claims of error. Finally, it is obvious that a party may contend on appeal that procedural errors were committed in the course of a proceeding without asserting that the decision would be reversible if it followed a fair proceeding. If the Commission had stated the grounds of its decisions fully, its awards might not have been open to attack by either party, but the procedure followed by fairminded and reasonable commissioners, in so important a matter, would presumably influence the outcome. The likelihood is certainly so strong as to entitle both parties to a proceeding in which that procedural right was preserved and the basis of decision laid bare. Furthermore, when there is a patent flaw in the proceeding before the commission which renders judicial review on its awards impossible, either party may first demand the procedures to which it is entitled and thereafter, if still aggrieved by the result, address itself to the merits.*

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* In both *United States* v. *Buhler*, 254 F. 2d 876, reversed, 305 F. 2d 319 (C.A. 5), and in *United States* v. *Cunningham*, 246 F. 2d 330, reversed, 270 F. 2d 545 (C.A. 4), certiorari denied, 362 U.S. 989, the United States first appealed on the

CONCLUSION

Three years have pased since the filing of the reports in these cases (August 19, 1960), and it is unreasonable to expect the commissioners now to remember why they reached their awards, even assuming that they are now available for further duty. Accordingly, we believe that the judgments of the court of appeals should be affirmed insofar as they reverse the judgments of the district court, but modified to provide for remand of the cases to the district court for new trials.

Respectfully submitted.

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OCTOBER 1963.

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merits as well as on the adequacy of the reports. In both instances, the courts of appeals remanded the initial appeals for fuller findings, demonstrating the futility of arguing the merits absent an adequate report.

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